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Supreme Court of the United States.

OCTOBER TERM, 1903.

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JAMES H. McKENNEY,
Clerk.

No. 261.

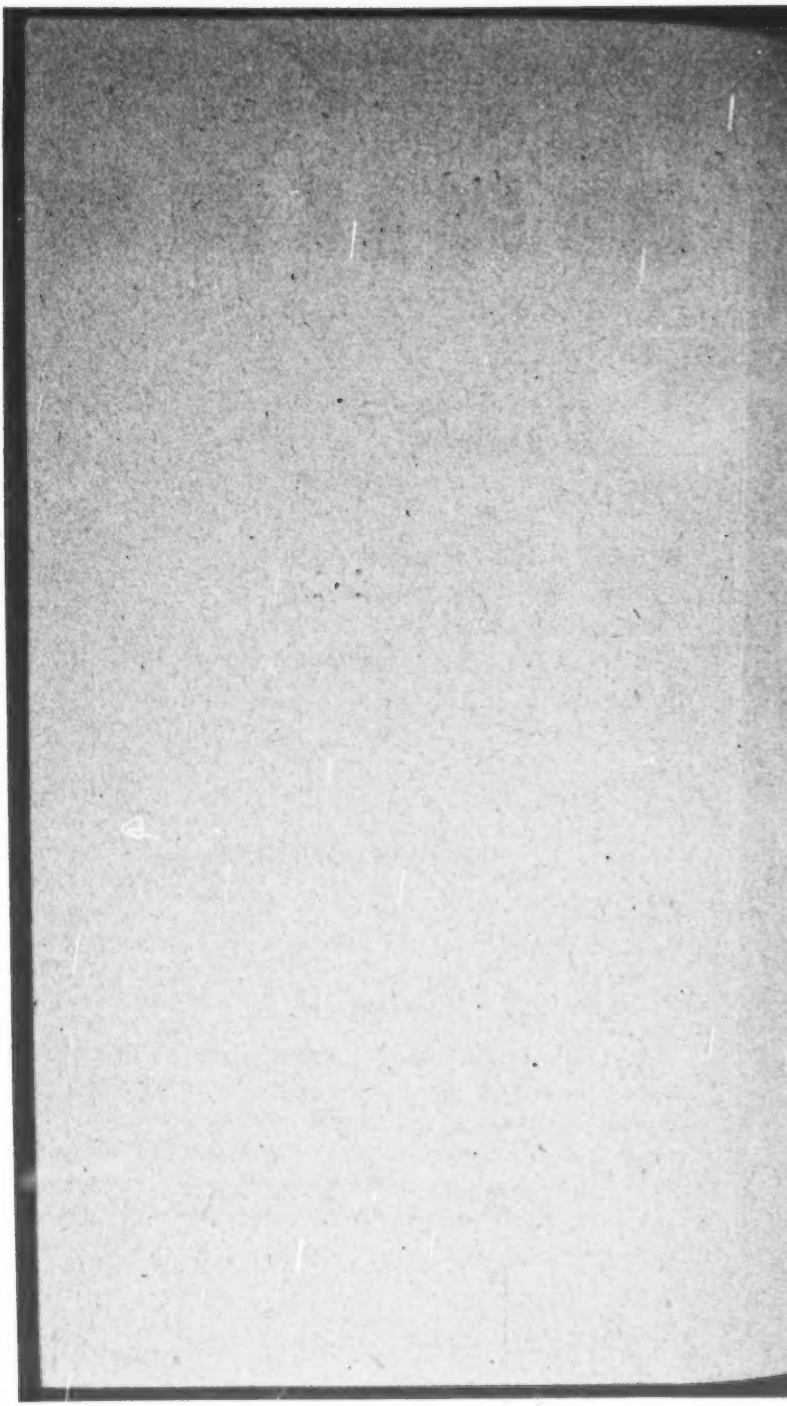
MERRITT CHANDLER,
Appellant,
vs.
ROSCOE D. DIX, Auditor General of the State of Michigan, James H. Kerr, County Treasurer of Alpena County, et al.,
Appellees.

BRIEF FOR APPELLEES.

CHARLES A. BLAIR,
Attorney General of the State of Michigan,
HENRY E. CHASE,
Deputy Attorney General,
Solicitors for Appellees.

BRIEF OF JOHN H. GOFF,
Of Counsel for Appellees.

LANSING, MICH.
ROBERT SMITH PRINTING CO., STATE PRINTERS AND BINDERS.
1904.



IN THE

Supreme Court of the United States.

MERRITT CHANDLER,

Appellant,

vs.

ROSCOE D. DIX, AUDITOR GENERAL OF THE STATE OF MICHIGAN, Et Al.,

Appellees.

BRIEF FOR APPELLEES.

Statement.

The original bill of complaint in this cause was filed in the Circuit Court for the Eastern District of Michigan, in Equity, September 19, 1900, against Roscoe D. Dix, Auditor General of the State of Michigan, the County Treasurers of the counties of Alpena, Cheboygan, Montmorency, Otsego and Presque Isle, respectively, and about fifty other defendants. Rec. p. 2.

General and special grounds of demurrer were alleged by the Auditor General and the several County Treasurers to the Bill. Rec. pp. 60 to 82. And the demurrers were allowed Jan. 6, 1902, and leave granted Complainant to amend his bill. Rec. pp. 83-84.

Afterwards, on February 5, 1902, Complainant filed amended bill, eliminating nearly all of the defendants, and the only defendants named in the amended bill are:

Roscoe D. Dix, Auditor General of the State of Michigan; James H. Kerr, County Treasurer of Alpena County; Thomas D. James, County Treasurer of Cheboygan County; Herman Lunden, County Treasurer of Montmorency County; Allan S. Martindale, County Treasurer of Otsego County, and Louis Bruder, County Treasurer of Presque Isle County, all in the State of Michigan and the Eastern District thereof and their successors in office. Rec. p. 85.

The Complainant in the amended bill sets forth that he is owner in fee of certain lands described in a schedule attached to the Bill (Rec. p. 85), and that the matters in dispute are the taxes assessed on said lands, and exceed in each county the sum and value of $2,000, and specifies the amount in each County, viz:—

In the County of Cheboygan.....	$11,000 00
In the County of Presque Isle.....	7,000 00
In the County of Alpena.....	25,000 00
In the County of Otsego.....	2,300 00
In the County of Montmorency.....	2,100 00

Rec. p. 85.

It is also averred that the Auditor General is the revenue agent to enforce the collection of said taxes, and that the County Treasurers are under the laws of the State charged with certain ministerial duties on the proceedings of the Auditor General. Rec. p. 87.

That the Auditor General has attempted by sales of said

lands to deprive Complainant of his title thereto. Rec. p. 95.

And that the Auditor General claims that said sales have vested the fee simple title to said lands in the State of Michigan. Rec. p. 87.

That the said lands are almost entirely wild and unimproved lands, all of which lands he claims to be in constructive possession of wh[illegible] not holding actual possession. Rec. p. 89.

The amended bill mentions the State homestead law as to tax lands, and avers that "said lands including some lands of your Orator have been so homesteaded." Rec. p. 97.

That no vested interest has been acquired in said lands by the State. Rec. p. 110.

That the value of the lands is over $50.000.00 exclusive of any lands which have been placed on the homestead list, and that said Auditor General claims to own the same. Rec. p. 111.

The Bill as amended avers the following tax laws of the State of Michigan to be unconstitutional and violative of the 14th Amendment:

1.

The tax law of 1869. Act No. 169 of Session Laws of 1869, p. 325. 1 Howell's Annoted Statutes, Sec. 1001 to 1216 inclusive. Rec. p. 85.

2.

The tax law of 1882. Act No. 9 of Public and Local Acts of Michigan, 1882, p. 7. 1 Howell's Annotated Statutes, Appendix. Rec. p. 86.

3.

The tax law of 1885. Act 153 of Public Acts of 1885, p. 175. 3 Howell's Annotated Statutes, Sec. 1169 l, to 1169 x 3. Rec. p. 86.

4.

The tax law of 1889. Act No. 195 of Public Acts of 1889, p. 230. 3 Howell's Annotated Statutes, Sec. 1170 d to 1170 l 2. Rec. p. 86.

5.

The tax law of 1891. Act No. 200 of Public Acts of 1891. Rec. p. 86.

6.

The tax law of 1893. Act No. 206 of Public Acts of 1893. 1 Compiled Laws of 1897. Sec. 3824 to 3962. Rec. p. 86.

The prayer of the Bill is as follows: (Rec. pp. 111-112)—

"1. That said defendants may be required to make full and direct answer to this your Orator's Bill of Complaint, but not under oath, the answer under oath being waived.

2. That all said laws may be declared unconstitutional and void.

3. That all assessments made of said lands, all taxes levied thereon, and all sales of said lands for taxes under and by virtue of said laws may be set aside, cancelled, held for naught, and declared null and void, as a cloud upon the title of your Orator.

4. That all conveyances made in pursuance of said laws and sales thereunder may be declared null and void and ordered to be delivered up to be cancelled and in default thereof that the decree herein operate as such conveyance.

5. That your Orator's title in and to said lands may be quieted and your Orator declared the owner in fee simple thereof and entitled to possession of the same.

6. That the defendants may, by the decree of this Honorable Court, be required to yield and deliver possession if in possession of said lands described in said "Exhibit A" to your Orator, and that your Orator may have the process of

the Court in due form to obtain possession thereof, and to remove therefrom all persons hereinbefore specified as now claiming said lands and parcels thereof and all other persons claiming by, through or under them or any of them, in the event that any such persons have since the filing of the Bill of Complaint herein, gone into possession of said lands or any part thereof.

7. That the Writ of Injunction may issue out of and under the seal of the Court to the above named defendants and each of them, their attorneys, solicitors, agents, and servants, commanding them and each of them absolutely and permanently to desist and refrain from committing any waste upon said lands described in said "Exhibit A," from assessing said lands or levying any taxes thereon against your Orator under said laws, and from selling or attempting to sell said lands for said taxes or taking any other or further proceedings under said laws, in regard thereto, and from selling, conveying, encumbering or otherwise disposing of said lands or any parcel or part thereof or interest therein, and that in the meantime, they may be so restrained until the further order of this Court.

8. Prayer for general relief.

Perry F. Powers, Auditor General of the State of Michigan, filed a demurrer to the Amended Bill, and to the demurrer he attached an affidavit that he was the "Auditor General of the State of Michigan, successor in office of Roscoe D. Dix, one of the above named defendants." Rec. pp. 122-123.

The demurrer alleged the following grounds:—

"1. That the complainant hath not in and by his said amended bill made or stated such a case as entitles him in a court of equity to any discovery from this defendant, or to any relief against him as to the matters contained in the said amended bill or of any such matters.

2. The complainant is not entitled upon said bill to the

relief he prays for because he had a plain and adequate remedy at law.

3. It does not appear in and by said amended bill that the matter in dispute exceeds the sum of two thousand ($2,000) dollars exclusive of interest and costs.

4. It appears upon the face of said bill that the complainant has been guilty of gross laches in regard to the matters therein set forth.

5. It appears by the said amended bill of complaint that this suit is in effect a suit against the State of Michigan.

6. An amended bill of complaint will not lie against the successor in office of Roscoe D. Dix, auditor general of the State of Michigan."

Demurrers were filed by the several County Treasurers, setting forth the same grounds of demurrer, as set forth in the demurrer of the Auditor General, excepting the 6th ground, which was that the County Treasurer was improperly joined as a defendant. Rec. pp. 124-125-127-129-131.

The general demurrers and that grounded upon the exemption of the State from liability were sustained. Rec. p. 133.

The opinion of District Judge Swan (Rec. p. 134), gives the reasons for dismissing the Bill.

Assignment of Errors.

Errors are assigned as follows by Complainant:—

"1. That the United States circuit court for the eastern district of Michigan, northern division, in equity, erred in sustaining the demurrer interposed by the defendants and defendants in error to the original bill of complaint filed in said cause.

2. That said circuit court erred in dismissing the said bill of complaint of complainant and plaintiff in error.

3. That said circuit court erred in not entering a decree for said complainant and plaintiff in error upon the pleadings in said cause." Rec. pp. 135-136.

ARGUMENT.

While the Bill states (Rec. pp. 86, 87) that the "disposition of your Orator's lands and of all taxes and alleged tax claims and tax titles against your Orator and his said lands are now governed by the provisions of said Tax law of 1893 as amended," it is nevertheless a matter of law that notwithstanding the Tax Laws of 1869, 1882, 1885, 1889 and 1891 have been in part repealed, all of them remain in force for many purposes, and for the protection of all rights gained thereunder, as will be seen by reference to the repealing sections of the succeeding tax laws. Matters of law are not admitted by demurrer.

Finney v. Guy, 189 U. S. 335; 23 S. C. R. 558.

Tax Law of 1869.

The tax law of 1869 and many other laws as to taxation were repealed by Act No. 11 of 1882. The repealing act states that "the same all are hereby repealed, so far as relates to the future assessment of taxes and the steps to collect the same. They remain in force only for the completion of all proceedings heretofore begun for the collection of taxes, except as otherwise provided by law, and for the protection of all rights gained thereunder, and conveyance of land heretofore sold or that may hereafter be sold, and all actions commenced and now pending under the provisions thereof."

Public and Local Acts of 1882, Act No. 11, p. 43.

Tax Law of 1882.

The tax law of 1885 repealed the law of 1882 in so far as it contravened the law of 1885. We quote the repealing section.

"Sec. 124. All acts or parts of acts in anywise contravening any of the provisions of this act are hereby repealed, but such repeal shall in no manner affect any rights which may have accrued under such acts or parts of acts."

Public Acts of 1885, Act No. 153, p. 210. Sec. 124.
3 Howell's Annotated Statutes, Sec. 1169 x 3 p. 2935.

Tax Law of 1885.

The tax law of 1889 repealed the tax law of 1885 so far as it contravened the law of 1889. We quote the repealing clause.

"Sec. 113. All acts or parts of acts in any wise contravening any of the provisions of this act are hereby repealed, but such repeal shall in no manner affect any rights which may have accrued under such acts or parts of acts, but the same shall remain in force for the completion of all proceedings heretofore begun for the collection of taxes, except as otherwise provided herein."

Public Acts of 1889, Act 195, Sec. 113, page 268.
3 How. Ann. Statutes. Sec. 1170 l 2.

The Tax Law of 1889.

The tax law of 1889 was repealed in 1891, and we quote the repealing section, omitting provisos.

"Sec. 111. Act 195, laws of 1889, being an act to provide for the assessment of property and the levy of taxes thereon and for the collection of taxes heretofore or hereafter levied, and all acts or parts of acts in anywise contravening any of the provisions of this act are hereby repealed, but such repeal shall in no manner affect any rights which may have accrued, or may hereafter accrue under such (acts) act or parts of acts."

Public Acts of 1891, Act No. 200, Sec. 111, p. 321.

The Tax Law of 1891.

The tax law of 1891 was repealed in 1893, and we quote the repealing section.

"Sec. 126. That act number two hundred of the public acts of eighteen hundred and ninety-one, entitled "An act to provide for the assessment of property and the levy of taxes thereon, and for the collection of taxes heretofore and hereafter levied, and to repeal act number one hundred and ninety-five of the session laws of one thousand eight hundred and eighty-nine, except as provided in this act, and all other acts and parts of acts in anywise contravening any of the provisions of this act," approved July seventh, eighteen hundred ninety-one, and all other acts and parts of acts in anywise contravening any of the provisions of this act, be and the same is hereby hepealed: Provided, That such repeal shall not destroy or affect any rights which may have accrued or may hereafter accrue under such acts or parts of acts while the same were in force."

Public Acts of 1893, Act No. 206, Sec. 126, p. 406.

Further Protection of Rights.

Rights of the State or persons which had accrued under previous laws, were protected by the law of 1893. The law of 1893 contained the following section:

"Sec. 125. All rights which may have accrued to any person, as well as all rights which have accrued or become vested in any individual, corporation, municipality, or the State, under any of the heretofore existing tax laws of the State which have been amended, modified, changed or repealed, shall not be affected, changed or destroyed, but the same shall remain in force, subject to review and enforcement in the courts of this State, and for the completion of all proceedings heretofore begun for the collection of taxes or the enforcement of all the requirements of such laws."

Public Acts of 1893, Act No. 206, Sec. 125, p. 406.
1 Compiled Laws of 1897, Sec. 3948, p. 1252.
Muirhead v. Sands, 111 Mich. 487-490.

1.

One cause alleged in the demurrer is that this is in effect a suit against the State of Michigan.

Rec. pp. 122-124-126-127-129-131.

We think an examination of the tax laws will lead to the conclusion that this is in effect a suit against the State.

The Tax Law of 1869.

Under the tax law of 1869, all property, real and personal, not expressly exempted, was subject to taxation.

Session Laws of 1869, p. 325, Sec. 1.

Property was assessed as of the second Monday of May in each year, Sec. 7, and the assessment was reviewed on the third Monday of May of each year, on which day any person might appear and be heard as to his assessment, Sec. 20, and at the October session of the Board of Supervisors, that board examined the rolls and equalized the value of the real estate in the several townships. Sec. 27. The township treasurer received the tax roll. Sec. 36. The taxes became by law a lien on real estate from the first Monday in December. The warrant for the collection of taxes was returnable to the County Treasurer on or before the first day of February then next. Sec. 37.

Transcripts of lands delinquent for taxes were returned to the Auditor General, during the month of March, Sec. 68. In July the Auditor General was required to make out a list of delinquent lands and interest to the first day of October, together with cost of advertising, postage and expense of sale, and returns thereof and conveyances. Sec. 78.

This statement was required to be published with a notice of sale to take place on the first Monday of October. Sec. 82. County Treasurer made the sales of delinquent lands on the day fixed for the sale.

It becomes important to note the disposition of the lands in case no bidders appeared at the tax sale. We quote in full upon this point, sections of the original act of 1869.

"Sec. 87. If any parcel of land cannot be sold to any person for the taxes, interest and charges, such parcel shall be passed over for the time being, and shall, on the succeeding day, or before the close of the sale, be re-offered; and if, on such second offer, or during such sale, the same cannot be sold for the amount aforesaid, the county treasurer shall bid off the same for the State."

"Sec. 88. All lands bid off for the State, as provided in the last preceding section, shall continue liable to be taxed in the same manner as if they were not the property of the State, and such taxes shall be a charge upon such lands."

1 Session Laws of 1869, Act 169, Secs. 87-88, p. 355.

Provision is also made in a preceding section, as follows:—

"Sec. 84. On the day designated in the notice of sale, the several county treasurers, under the direction of the Auditor General, shall commence the sale of those lands on which the taxes shall not have been paid as aforesaid, and shall continue the same from day to day (Sundays excepted), until so much of each parcel thereof shall be sold as shall be sufficient to pay the taxes, interest, and charges thereon: Provided, That every description of land embraced in said notice, which has been bid off to the State at a previous sale, and which remains unredeemed or otherwise disposed of, shall be bid off to the State by said County treasurers; and any sale made in contravention of this proviso shall be absolutely void and of no effect."

1 Session Laws of 1869, Act 169, Sec. 84, p. 355.

The County Treasurer under section 87 above quoted, bids off the land to the State. Redemption by the owner may be had on or at any time previous to the 30th day of September, next succeeding the sale. Sec. 93. If no redemption takes place, the State if the proceedings were regular, becomes the absolute owner of the land.

Auditor General v. Monroe Co. 36 Mich. 75 (1877).
Auditor General v. Saginaw Co. 62 Mich. 597 (1886).

In the case of Auditor General vs. Monroe Co. supra, the theory and practice of State taxation previous to 1869 were discussed by the Supreme Court. The case arose on an ap-

plication for mandamus to compel the County to raise a State tax to refund a loss on lands which the State had bid off and called State tax lands. Justice Campbell delivering the opinion, said at p. 75:

"The law assumes that the tax sales have been valid, and that the county has therefore levied all the taxes it was required to levy, and that these have been satisfied by payment of sale."

The case of Auditor General v. Saginaw Co. supra, involved a settlement of accounts between the County and the State. Justice Sherwood writing for the Court, said p. 597:

"The State purchases and holds under sales made for taxes in the same manner as individuals."

That such lands were regarded by the Legislature as the property of the State, may also be seen in that portion of the law of 1869 which provided for exemptions. Sec. 5. The following property shall be exempt from taxation, viz:

* * * * *

6. "All the property of the United States and of this State except lands bid off to the State at tax sale, except as hereinafter provided."

1 Session Laws, 1869, Act 169, Sec. 5, Sub. 6, p. 327.

The result of an examination of the law of 1869, definitely shows that the State of Michigan obtains the title to land bid in by it if the proceedings were in accordance with law. Excepting where the proceedings were open to attack for jurisdictional defects, such as payment of the tax, or because the land was not subject to taxation, or had not been assessed as provided, as set forth in Sec. 164, the State even if it obtained no title on the sale still retained its lien created by Section 40 of the Act of 1869, and could transfer that lien to a purchaser, and the purchaser could recover the

legal taxes from the owner, in case the owner brought ejectment and recovered judgment against the purchaser.

We quote the section in full:

"Sec. 165. If any conveyance made by the Auditor General pursuant to a sale made for non-payment of taxes, shall prove to be invalid and ineffectual to convey title, for any other cause than such as are enumerated in the preceding section, the lien which the State had on such land for its rightful proportion of taxes for State, county, township, and all lawful purposes, shall remain in full force, and shall be transferred by such deed to the grantee and vested in him, his heirs and assigns, who shall be entitled to recover from the owner of such lands the amount of such legal taxes, together with all the lawful charges, with interest at twenty-five per cent. from the date of such sale, and also the amount of all subsequent taxes paid by the person holding such title from the Auditor General, with like interest; and such claim shall be a lien upon such lands, and the same shall be bound for the payment thereof; and, in case judgment shall be rendered against the person holding title from the Auditor General, as aforesaid, for the recovery of such land, in any action of ejectment, or other action, either at law or in equity, the court shall ascertain the amount due to the party holding such tax deed, for principal and interest, and for all improvements made by him on such lands, and shall decree the payment thereof within such reasonable time as may be determined by such court; and in default of such payment, shall decree that such lands be sold therefor, or sufficient thereof to pay the account (amount) of such improvements, principal and interest, due to the party having such Auditor General's deed: Provided, That there shall be (no) right of redemption of such property after the date of sale."

1 Session Laws of 1869, Act 169, Sec. 165, p. 378.
1 How. Ann. Statutes, Sec. 1167.

That judgment must be recovered before the purchaser can enforce his lien is settled by the decision of the State Court in several cases.

Tillotson v. Circuit Judge, 97 Mich. 585.

In the case of Tillotson v. Circuit Judge, supra, tax titles for taxes of 1874, 1876 to 1880 had been adjudged invalid in ejectment, and while the Court held that the proceedings to enforce the lien must be on the equity side of the court, yet it was held at p. 588:

"The proper proceeding in these cases was established in Weimer v. Porter, supra. It was there held that in the ejectment suit the tax title must be adjudged against the defendant before he can enforce a lien upon the premises for the taxes paid, and that the right to prosecute or litigate the claim for subsequent taxes is postponed until the rendition of the judgment, and that a supplementary proceeding must be instituted on the equity side of the court. The contention of the respondent is that the amount of the lien should be fixed in this proceeding, and that, after that is fixed in the suit at law, the proceeding in equity must be instituted. We think the entire proceeding must be in chancery, under that decision, which was again approved in Ellsworth v. Freeman, supra."

We think it clearly appears that under the law of 1869 when lands were bid off to the State, and the lands were exempt from taxation, or were not assessed, or the taxes had been paid, or other jurisdictional defects existed, the State would not obtain much by the bid. If no jurisdictional defects existed, but irregularities existed, and the lands were bid to the State, the State retained its lien, and could transfer the same, and if the lands were lawfully taxed, and proceedings regular, and the State bid off the land, the State after the time for redemption expired, became the owner of an absolute title.

The Tax Law of 1885.

Omitting for the present a reference to the law of 1882, the tax law of 1885 may be referred to in order to ascertain how lands were disposed of at tax sales, in the absence of individual purchasers. The taxes levied under the Act of 1885 were made a lien on real estate, and the lien continued until payment thereof.

Public Acts of 1885, Act 153, Sec. 26, p. 185.

Sec. 62 of Act 153 of the Public Acts of 1885, is a transcript of section 87 of Act 169 of Session Laws of 1869, hereinbefore quoted in full, with the addition of a proviso, which is as follows:—

"Provided, That from and after the passage of this act, if the treasurer of any county shall, for any reason, fail to offer the lands lying therein and advertised as for sale for delinquent taxes thereon, then so many of the lands so advertised as shall not be so offered for sale shall be considered and treated as if bid off for the State by the county treasurer, and shall be subject to redemption and sale, in the same manner, and within the same time as may be provided by law in the case of lands actually bid off for the State, as is provided in the first clause of this section."

Public Acts of 1885, page 194.

It may also be noted that Sec. 63 of Act No. 153, of the Public Acts of 1885 is a transcript of Sec. 88 of Act 169 of the Session Laws of 1869. We have hereinbefore quoted in full section 88 of Act of 1869.

Lands bid off to the State under the law of 1885, were considered by the Legislature as property of the State, as ap-

pears by the section relative to exemption, which was as follows:

"Sec. 3. The following property shall be exempt from taxation:

First, All public property belonging to the United States, to this State, or to any county, city, village, township, or school district within this State, save lands purchased at tax sales, and still held by the State."

Public Acts of 1885, Act 153, p. 176.
3 How. Ann. Statutes, Sec. 1169 l 2.

Tax Law of 1882-1889.

The tax law of 1882 and 1889 made the taxes levied on real estate a lien thereon, which continued until payment thereof.

Public Acts of 1882, Act 9, Sec. 26, p. 16.
Public Acts of 1889, Act 195, Sec. 26, p. 240.

The tax law of 1882 changed the method of procedure in relation to sales of lands for delinquent taxes, and provided for a petition in chancery to enforce the lien, and for a decree. This was also the law of 1889. The petition prayed a decree against the lands in favor of the State of Michigan, and the decree was in favor of the State.

Public Acts of 1882, Act 9, Sec. 53-54-57-58, pp. 23-25.
Public Acts of 1889, Act 195, Sec. 52-53-56-57, pp. 249-251.

In case the lands could not be sold, the County Treasurer was required to "bid off the same in the name of the State for

the use of the State, County and town in proportion to taxes, interest and charges due each," and the County Treasurer was required to enter in the tax record, the word "State" opposite each parcel bid off in the name of the State. It was also further provided that "all lands bid off in the name of the State shall continue liable to be taxed in the same manner as *if they were not the property of the State.*"

Public Acts of 1882, Act 9, Sec. 63, p. 27.
Public Acts of 1889, Act 195, Sec. 62, p. 254.

The Tax Law of 1891.

The tax law of 1891 made the taxes on real estate a lien thereon, which was to continue until payment thereof. It also provided for a petition in chancery for a decree in favor of the County, in which the lands were situated, and the decree was in favor of the County, in case the taxes were valid.

Public Acts of 1891, Act 200, Sec. 52-56, 57, pp. 302-306, 307.

At the sale under the decree if the lands could not be sold, the county treasurer was required to "bid off the same in the name of the State for the State tax, interest thereon, and costs and charges for the use of the State," and he was required to enter in the tax record the word "state" "opposite each parcel bid off in the name of the State," and it was further provided that "all lands bid off in the name of the State shall continue liable to be taxed in the same manner as if they were not the property of the State."

Public Acts of 1891, Act 200, Sec. 62, pp. 309-310.

There was evidently an omission in the law, as will be seen by an examination of section 80 and 81a, which were as follows:—

"Sec. 80. Any person may purchase any State tax lands of such county treasurer by paying therefor the amount for which the same was bid off to the State with interest on the same at the rate of one per cent per month from the date of sale."

"Sec. 81a. Upon the payment to the county treasurer as aforesaid, he shall execute to the purchaser, a deed conveying all right, title and interest of the State or county to said tax lands acquired by virtue of the original sale or sales to the said State or county."

Public Acts of 1891, Act 200, Secs. 80-81a, p. 314.

What became of the County tax and the township tax, seems not to have been decided. The Legislature hastened at the next session in 1893 to correct the omission, and amended Sec. 62 above cited, by an addition thereto. We give the addition in italics.

"The County Treasurer shall bid off the same in the name of the State for the state tax, interest thereon and costs and charges for the use of the State, *and in such case the county, township, school and other taxes assessed on such lands so bid off to the State shall remain a lien upon said lands, and any person or persons who shall afterwards purchase such lands of the State as state tax lands or otherwise, shall be liable for and shall pay to the County Treasurer, all taxes then remaining unpaid and assessed against such lands, together with interest thereon at the rate of six per cent. per annum from the time said lands were returned delinquent for taxes until the time of such sale.*"

Public Acts of 1893, Act 16, Sec. 62, p. 15.

Section 80 was also amended to read as follows:—

"Sec. 80. Any person may purchase any State tax (land) lands of such county treasurer by paying therefor the amount for which the same was bid off to the State with interest on the same at the rate of one per cent per month from the date of sale, together with the other taxes remaining a lien on such lands at the time of the sale aforesaid with the interest thereon at the rate provided for in this act."

Public Acts of 1893, Act 16, Sec. 80, p. 18.

The tax law of 1891 treated lands bid off to the State as the property of the State, as will be seen by reference to the provision as as to exemptions.

"Sec. 3. The following property shall be exempt from taxation:

First, All public property belonging to the United States, to this State, or to any county, city, village, township, or school district within this State, save lands purchased at tax sales and still held by the State."

Public Acts of 1891, Act 200, Sec. 3, p. 281.

The Tax Law of 1893.

The law of 1893 made taxes on real estate a lien thereon to continue until payment thereof.

Public Acts of 1893, Act 206, Sec. 40, p. 372.
1 Compiled Laws of 1897, Sec. 3863, p. 1209.

This also provided for a petition in chancery to enforce the lien and the petition prayed for a decree in favor of the

State, and the decree was in favor of the State of Michigan and against the lands, if the taxes were valid.

Public Acts of 1893, Act 206, Sec. 60-61-66-67, pp. 380-381-384, 385.

Lands were to be bid off in the name of the State, and the word "state" was to be placed opposite each parcel bid off in the name of the State.

Public Acts of 1893, Act 206, Sec. 70, p. 389.

By this Act of 1893 it was also provided that "all lands bid off in the name of the State shall continue liable to be taxed in the same manner as if they were not the property of the State, except as hereinafter provided."

Public Acts of 1893, Act 206, Sec. 70, p. 390.

Lands bid off to the State were regarded as the property of the State, as will be seen by reference to the exemptions.

"Sec. 7. The following real property shall be exempt from taxation":

* * * * *

"2. All public property belonging to the State of Michigan, except licensed homestead lands, part paid lands held under certificates, and lands purchased at tax sales, and still held by the State."

Public Acts of 1893, Act 206, Sec. 7, p. 355.

This examination of the tax laws of 1869, 1882, 1885, 1889, 1891 and 1893 as to lands bid off to the State and held by the State, shows, we submit, that the state owned them abso-

lutely, after redemption expired. In any case, the State held whatever interest passed by the sale. That interest, because of defects might be nothing more than the lien which was originally created by each law respectively. Such is the holding of the Supreme Court of Michigan.

Conn. Mutual Life Ins. Co. v. Wood. 115 Mich. 444, (1897).

The facts in this case can be stated in connection with the tax law. Two parcels of lands were assessed and taxes levied thereon in the year 1891. This assessment was of course, under the law of 1891. The warrant to the Township Treasurer, under the law of 1891, required him to make return to the County Treasurer, on or before February first, 1892.

Public Acts of 1891, Act 200, Sec. 28, p. 294.

Under this same act of 1891 if the taxes remained unpaid one year from the first day of July next after the return of the lands to the County Treasurer, the lands became subject to sale. Under that law the County Treasurer could have filed his petition in July of 1893.

Public Acts of 1891, Act 200, Secs. 51-52, p. 302.

The Act of 1893, however, took effect June 12, 1893, which was before the County Treasurer had a right to file a petition.

Public Acts of 1893, Act 206, Sec. 137, p. 409.

The title to the Act of 1893, shows that it was for the "collection of taxes heretofore * * * levied."

Public Acts of 1893, p. 354.

It was provided that, "In the disposition and sale of such delinquent tax lands the people of the State of Michigan shall be deemed to have a valid lien upon such lands, with all the rights to enforce the same as a preferred or first claim upon such lands, and the rights and choses to enforce such lien shall be held and construed by all the courts of this State as the *prima facie* rights of the State, and shall not be set aside or annulled except in the manner and for the causes herein specified."

Public Acts of 1893, Act 206, Sec. 60, p. 381.

The petition and decree for the taxes was therefore necessary under the law of 1893, and the sale under that law for the taxes of 1891, would occur in December of 1893.

The statement of the case, page 445, shows that the lands were bid off to the State at the tax sales of 1893, for the taxes of 1891. In the mean time the taxes of 1892 had been levied while the State was holding the bid for the lands. In 1894, the Auditor General included in his petition for decree and sale of lands for taxes of 1892, the same lands. In March of 1897, the Insurance Company filed its petition to set aside the sales, alleging among other things that the law of 1893 was violated by the Auditor General in that he had wrongly included said lands in his petition of 1894. The part of the law relied on was as follows:

"Lands hereafter bid off in the name of the State, and thus held, shall not be included in said petition."

Public Acts of 1893, Act 206, Sec. 61.
Conn. Mut. Life Ins. Co. v. Wood, 115 Mich. 445-6.

It was contended on the part of the State and also the other respondents, that the word lands did not mean the lands and the title thereto, but only such interest as the State had acquired by former sales, and that only that interest was excluded by the law from the petition. The question was thus squarely presented to the Court as to what interest the State took in lands bid in by it and after redemption had expired. Chief Justice Grant after rehearing, delivering the unanimous opinion of the Court said at pp. 447-448:

"After able arguments by several eminent counsel, several exhaustive briefs, and a careful examination by ourselves, we again reach the same conclusion stated in the former opinion.

1. Counsel for the defendants now seek to sustain their position by applying a restricted meaning to the word "lands" in the statute. They insist that it does not mean the lands and the title thereto, but only such interest as the State has acquired by former sales, and that only that interest is excluded from the petition. This contention cannot be maintained. The term has a well defined meaning. There may be cases where, in instruments or in laws, other language may be used, showing that a term is used in a restrictive sense. We, however, find no language in this statute which can be construed into a restriction of the well understood term "lands." "In law, 'land' signifies any ground forming part of the earth's surface which can be held as individual property, whether soil or rock, or water covered, and everything annexed to it, whether by nature, as trees, water, etc., or by the hand of man, as buildings, fences, etc." Cent. Dict. When the lien given by the statute is foreclosed by the court in chancery, the evident purpose is to convey to the State or to the private purchaser the absolute title in fee, a title which completely destroys the original one. It is of no significance that the State does not bid in the land for speculative purposes, or that it acquires no possessory rights

therein. or that it remains liable to taxation for successive years. When the lien is foreclosed, the land sold, and the time of redemption expired, the State or the private purchaser owns the complete title in the land, or it owns nothing. The law may preserve the lien in case the title is held void, but that does not affect the quantity of the title conveyed, which is the entire or nothing."

It is clear we think from the laws and decisions of the State Court that the State obtains after bidding off lands and after the redemption expires, title or color of title to the lands, and no officer of the State has any interest therein. One especial branch of the tax law may be examined in this connection, and that is the portion thereof relating to homesteads, which is mentioned in the Amended Bill, (Rec. p. 97).

The tax homestead law was first incorporated in the tax law of 1893, and the section which we wish to call attention to. is as follows:—

"Sec. 127. Whenever it shall hereafter appear that any lands delinquent for taxes have been bid off to the State for a consecutive period of more than three years, and that no application has been made to redeem or purchase the same, it shall be the duty of the Auditor General and the Commissioner of the State Land Office, when requested so to do by the township board of the township wherein such delinquent lands are situated, to cause an examination of such lands to be made as soon as practicable, to ascertain their value, and the cause of the non-payment of taxes thereon, and if it shall appear that such lands are barren, swamp or worthless lands, and have been abandoned by the owner, upon a certificate being filed by the examiner to that effect, the Auditor General is hereby authorized to make a transfer by deed of the same to the State, as to an individual. as provided in this act, which deed shall be recorded in the proper county and a copy filed in the office of the Commissioner of

the State Land Office, and said commissioner shall thereafter hold such lands as State lands subject to sale as hereinafter provided."

Public Acts of 1893, Act 206, Sec. 127, p. 406.
Amended,—
Public Acts 1895, Act 154, p. 301, Sec. 127.

Said section 127 as amended in 1899, declares among other things that after lands have been delinquent for any five years, and have been sold to the State for taxes of more than one year, and certain other conditions exist, "the title to the State shall be deemed absolute in and to said lands."

Public Acts of 1899, Sec. 127, Act No. 107, p. 151.

It appears from this section 127, that the Auditor General is required to deed these lands to the state "as to an individual," and the Commissioner of the State Land Office holds such lands as State Lands subject to sale. And under section 130, the County Treasurer receiving a list of the lands, required to notify the Board of Supervisors "that such lands belong to the State and are no longer taxable." And under section 131, such lands are made subject to homestead entry. There is thus no question that the State gets a deed of these lands.

The Supreme Court of the State of Michigan has decided that the State is prima facie the owner of lands deeded to it under said section 127.

Semer v. Auditor General, 95 N. W. Rep. 732 (1903).

In Semer v. Auditor General, supra, a Bill was filed by the owner of the original title against the Auditor General and others, alleging among other things that the certificate had been filed that the lands had been abandoned, and had been bid off by the State for more than three consecutive years, and had been deeded to the State by the Auditor General, and application made to enter same as a homestead. The prayer of the bill was that the taxes be set aside, deed declared void, homestead entry invalid, and statute unconstitutional. A demurrer to the Bill was based on Sec. 131, and was by the Circuit Court in Chancery overruled, but the Supreme Court reversed the lower court and sustained the demurrer. Chief Justice Hooker, delivering the opinion of the Court said, at page 733, N. W. Rep:—

"This land was prima facie the property of the state; and while, if its title was invalid, the true owner might controvert it, he was in no way concerned with what disposition the state should make of the land, if it was valid, especially, as it could transfer no better title than it had."

Recurring again the title of the State to lands bid off by it, it will be seen that the Supreme Court of the State is consistent in holding that the State takes title.

Allen v. Cowley, 128 Mich. 530. (1901).
Auditor General v. Improvement Co. 129 Mich. 182. (1901).

Allen v. Cowley, supra, was a case where plaintiff brought replevin for logs which he had cut on state tax lands, but which had been taken from his possession by defendant. The Sheriff had sold the logs under warrant from the Auditor General. The defendant was a purchaser at the Sheriff sale of the logs, and judgment was rendered for defendant. Justice Hooker delivering the opinion of the Court said, p. 532:

"On the face of the testimony the court was not in error in sustaining the tax proceedings for 1893, and he might have added that title to the land was in the State.

The title to the land being in the State, it was the lawful owner of the timber thereon, and the plaintiff was a trespasser in cutting it. It did not become his by such cutting; nor was the original owner able to convey title to him, because she had no title, it having been divested by the sale for taxes, whereby her interest vested in the State absolutely after the expiration of the period for redemption. The defendant purchased and paid for the title of the State through proceedings intended to conform to a statute authorizing it."

Auditor General v. Improvement Co., supra, involved the exemption from taxation of land which had been bid off to the State, and had been deeded to the State by the Auditor General, although they had not been bid off to the State for a consecutive period of more than three years. Justice Moore speaking for the Court said p. 187:

"It is very probable that, if the title of the State had been questioned in a direct proceeding, under the case of Connecticut Mut. Life Ins. Co. v. Wood, 115 Mich. 450 (74 N. W. 656), it would have been held invalid; but the record does not disclose that any steps have been taken by the former owners to vacate the decrees under which the State obtained title, and no effort may ever be made by any person having the right to do so to question the title of the State. The title, then, to these lands being in the State, was it not competent to exempt them from assessment?"

The Supreme Court of the State also holds that the statute of limitations runs against the state upon lands bid off to the State at a tax sale.

Chamberlain v. Ahrens, 55 Mich. 111.

It is this prima facie title of the State of Michigan to the lands in question which the Complainant asks to have declared void, and asks that he may be declared the owner thereof in fee simple.

The suit is therefore in effect a suit against the State. It has been said that this is not a suit against the State, because the State is not a party to the record.

Osborn v. Bank, 9 Wheat, 738 (1824).
Bank v. Hastings, Walker's Chancery, p. 9.
Bank v. Hastings, 1 Douglass, Mich. p. 225 (1844).

There is language used in the case of Bank vs. Osborn, supra, which furnishes some basis for the argument advanced, but that case we submit is not now followed.

Exparte Ayres, 123 U. S. 443.

In the Ayres case, the Attorney General of the State of Virginia, was a party to the record. In that case Mr. Justice Mathews, delivering the opinion of the court said:

"It must be regarded as the settled doctrine of this Court established by its recent decisions, that the question whether a suit is within the prohibition of the eleventh amendment, is not always determined by reference to the nominal parties on the record."

The State Supreme Court in the case of Bank v. Hastings, 1 Douglass (Mich.) 241, critically examines the case of Bank v. Osborn, and follows it. We shall hereafter show that the Michigan Supreme Court does not now follow Bank v. Osborn.

Examination of the Bill of Complaint as amended in the case at bar, will we believe show that no personal act on the part of the Auditor General or the respective County

Treasurers is alleged. It is alleged that County Treasurers are charged with certain ministerial duties in the proceedings of the Auditor General for the collection of taxes. Rec. p. 5, par. 5.

It is alleged that the defendants are enforcing the tax law as valid. Rec. p. 111, par. 62.

We submit that there is no allegation in the Bill that the defendants or any of them are in actual occupancy of the lands in question, or any of them. The allegations are to the contrary. It is alleged that "the said lands consist almost entirely of wild and unimproved lands, from many of which the timber has been entirely or partially removed; all of which said lands he claims to be in constructive possession of, where not holding actual possession."

Rec. p. 89, par. 13.

We submit that if the Complainant is holding actual possession of any of the lands, then the defendants cannot be said to be in possession thereof, and if the Complainant is in constructive possession of all of which he is not in actual possession, then the defendants cannot be said to be in possession thereof, because constructive possession can only exist in a person where there is no adverse, actual possession. The allegation therefore is resolved into the statement that the lands are vacant where not in the actual possession of the Complainant.

A construction of this allegation in the Bill, which should make it aver that the defendants were in actual possession, would render the Bill of no effect, because in such case there would be a remedy at law.

Pursuing the examination further as to the personal acts of the defendants, we note that it is averred that that the Auditor General claims that the said sales have vested the title to said lands in the State of Michigan.

Rec. p. 87, par. 9.

Certainly this is no personal claim to the land. Notwithstanding the taxes on these lands have not for many years

been paid, and sales thereof have been made to the State, yet the State has not in any way interferred with the actual possession of the Complainant, and has not trespassed thereon, although title is claimed to be in the State. There is an argumentative allegation in the bill that the defendants are trespassers, wherein it is said that the Auditor General and the County Treasurers "asserting any rights or claiming any title or attempting or threatening to do so under the provisions of said laws, are trespassers."

Rec. p. 110, par. 58.

The word "trespassers" is given a new meaning in regard to land by this allegation. Originally, according to Blackstone, "It signifies no more than an entry on another man's ground, without a lawful authority, and doing some damage, however inconsiderable to his real property."

The bare statement of the Auditor General that these lands belong to the State without any attempt to take possession or to dispossess the Complainant is not such a trespass as injunctions are issued to prevent, and involves no personal violence or wrong on the part of the defendants.

The allegation in the bill, Rec. p. 111, Sec. 65 that the Complainant fears the Auditor General will sell the lands, does not aver any threatened wrong, because conveying the land to private persons, would enable the Complainant to take measures not prohibited by the eleventh amendment. One branch of the prayer of the Bill is for an injunction against the defendants commanding them and their agents to desist from assessing the lands. Neither the Auditor General nor the County Treasurers are assessing officers in the State of Michigan. The Bill itself avers that the Supervisor makes the assessments. Rec. p. 91, par. 17. The Supervisor is a constitutional officer.

Const. of Michigan, Art. XI, Sec. 1.

Such a suit as the present has been held by the Supreme Court of Michigan to be a suit in effect against the State, and it was held such a suit could not be maintained in the State Court.

Burrill v. Auditor General, 46 Mich. 256. (1881).

In this case of Burrill v. Auditor General, supra, it will appear that Counsel for the Complainant therein cited Osborn v. Bank, supra, and Bank v. Hastings, supra, in support of the contention that a Court could pass on the claims of the State where they are incidental to a suit against a state officer.

The other Justices concurring, Justice Graves, delivered the opinion of the Court as follows: p. 257,—

"This case comes up on an appeal against a decree made in the Circuit Court in chancery for the county of Saginaw dismissing complainant's bill. The end sought by the cause is to quiet complainant's title as against the title obtained by the State under sales of the lands for several years for unpaid taxes. The objection which is insisted on against the title acquired by the State is that the assessor's certificate was in each year fatally defective.

The lands are vacant and the Auditor General is entirely passive, and in no event could he meddle with them except as authorized by law. The right the State holds in the lands is not subject to litigation in this way. The law has not commissioned the Auditor General to represent the State for any such purpose.

What is contemplated is to annul the title derived to the State through the tax proceedings, and the suit is virtually therefore against the State itself. But we fail to find that it has consented to be made a litigant in this matter in regard to any land to which it claims title.

This is not a case where tax proceedings are still going on

and a claim is made that they are tainted with fraud, or that some officer has either acted in an unauthorized or illegal manner or is about doing so.

It is one where the proceedings have been allowed to culminate in sales to the State and where the tax title cannot be contested and set aside unless the State consents to become a litigant for the purpose of the controversy and points out the officer to be made a party. The State's title to any other vacant lands could with equal propriety be forced into controversy in chancery without its assent.

The want of jurisdiction is clear.

The decree is right and must be affirmed with costs.

The other Justices concurred."

The case of Burrill v. Auditor General, supra, was cited in the case of Auditor General v. Saginaw Co. Supervisors, 62 Mich. 597 (1886), the Court saying:

"The State purchases and holds under sales made for taxes in the same manner as individuals. A bill cannot be upheld against the Auditor General to annul the title of the State obtained at a tax sale, for the reason that he has never been authorized by the statute to represent it for that purpose."

In the case of McElroy v. Swart, et al., 57 Mich. 500, (1885), the bill showed that a lumberman had cut timber on state lands, and sold the same to one Minor, and the State Trespass agent was averred to have obtained from Minor under misrepresentations and threats, some money and two promissory notes, running to the State Land Commissioner. The bill prayed that the collection of notes might be enjoined, and the same cancelled. Defendant Partridge answered that he was State Land Commissioner and Swart was State Trespass agent, and he Partridge had received the notes in his official capacity, and turned them over to the State Treasurer. The bill was dismissed in the Circuit Court, and the case was affirmed in the Supreme Court.

Justice Sherwood, stating, p. 504: "The State is substantially the defendant."

Justice Campbell, said p. 505: "I concur in the result as I do not think any bill could lie to reach funds of the State in the hands of the proper officers."

Cooley, C. J. concurred.

The case of Burrill vs. Auditor General, supra, was decided in 1881, over ten years after the passage of the tax law of 1869, and it is probable the rights of the State arose under that law. A comparison of the case of Burrill v. Aud. General, supra with the one at bar will show the cases to quadrate.

1.

In the Burrill case the lands were vacant. In the case at bar the lands are wild, and are averred to be in the actual or constructive possession of the Complainant.

Rec. p. 89, par. 13.

2.

In the Burrill case the Auditor General was said to be passive. Yet under the law of 1869, the Auditor General was required to sell to applicants any unsold state tax lands.

Session Laws of 1869, p. 368, Sec. 128.

State tax lands were not exempted as we have shown from taxation, and taxes were levied on them, and they were sold from year to year, under the law of 1869.

The Complainant in the case at bar brings himself under the law of 1869, because he says, Rec. p. 87, par. 8, "some proceedings were taken under the General Tax Law of 1869." And again in the same paragraph 8, the Complainant mentions purported assessments "for various years from and including the year 1878."

We have therefore in the case at bar, lands held by the State bid off under the law of 1869, and succeeding laws. The rights of the State in those lands have been preserved. The Auditor General however is just as passive under the present tax law of 1893 as under the Tax law of 1869.

The contention that the present suit is a suit against the State, is supported by the case of Smith v. Reeves, 178 U. S. 436.

In Smith v. Reeves, supra, suit was brought against the defendant "as treasurer of the State of California" to recover taxes paid by the receivers of a railroad who were dissatisfied with the assessment. Mr. Justice Harlan, delivering the opinion of the court said:

"Is this suit to be regarded as one against the state of California? The adjudged cases permit only one answer to this question. Although the state, as such, is not made a party defendant, the suit is against one of its officers as treasurer; the relief sought is a judgment against that officer in his official capacity; and that judgment would compel him to pay out of the public funds in the treasury of the state a certain sum of money. Such a judgment would have the same effect as if it were rendered directly against the state for the amount specified in the complaint."

In the case at bar, the suit is brought against Roscoe D. Dix, Auditor General of the State of Michigan and certain County Treasurers, "and their successors in office." There is no averment that any of these defendants are claiming any personal interest in the land. It is on the contrary expressly averred that the Auditor General claims the tax sales have vested the fee simple title of the lands in the State of Michigan.

In some way or other therefore, the title of the State is sought to be divested, and it is difficult to see how the State can be deprived of its property when it is land, any more than it can of its property consisting of cash which has been paid to its State Treasurer.

The prayer of the Bill by what it omits as much as what it contains, shows that the idea of a suit against the State may have forced itself on the mind of the pleader.

Rec. p. 111-112.

The general rule is that equity jurisdiction is in personam. The statute of the State of Michigan, relative to quieting title follows, the general rule in equity. It provides that if the Complainant establishes his title to the lands "the defendant shall be decreed to release to the complainant all claims thereto."

1 Comp. Laws, 1897, Sec. 448.

In view of the general rule, in equity, we should expect ordinarily to find in the bill a prayer that the defendants convey and release to Complainant, not their claims, because they make no claim, but the title of the State, or that a trustee be appointed to convey the title of the State, but such a prayer would present very clearly that the suit was against the State, and the prayer in substance, is that the title of the state be annulled by a decree, and the action seems to be in rem according to the prayer.

The jurisdiction of equity courts in this regard is discussed by this Court in the case of Hart v. Sansom, 110 U. S. 151. Mr. Justice Gray delivering the opinion of the Court said:

"Generally, if not universally, equity jurisdiction is exercised *in personam*, and not *in rem*, and depends upon the control of the court over the parties, by reason of their presence or residence, and not upon the place where the land lies in regard to which relief is sought. Upon a bill for the removal of a cloud upon title, as upon a bill for the specific performance of an agreement to convey, the decree, unless otherwise expressly provided by statute, is clearly not a judgment *in rem*, establishing a title in land, but operates

in personam only, by restraining the defendant from asserting his claim, and directing him to deliver up his deed to be canceled, or to execute a release to the plaintiff. Langd. Eq. Pl. (2d Ed.). §§ 43, 184; Massie v. Watts, 6 Cranch, 148; Orton v. Smith, 18 How. 263; Vandever v. Freeman, 20 Tex. 334. It would doubtless be within the power of the State in which the land lies to provide by statute that if the defendant is not found within the jurisdiction, or refuses to make or cancel a deed, this should be done in his behalf by a trustee appointed by the court for that purpose. Felch v. Hooper, 119 Mass. 52; Ager v. Murray, 105 U. S. 126, 132. But in such a case, as in the ordinary exercise of its jurisdiction, a court of equity acts *in personam*, by compelling a deed to be executed or concelled by or in behalf of the party. It has no inherent power, by the mere force of its decree, to annul a deed or to establish a title."

II.

The State of Michigan has never unreservedly consented to be sued, and has not consented as we hope to show, to be sued in equity in the Courts of the United States.

Under Act 169 of Session Laws of 1869, Sec. 133, the Auditor General might be made a defendant in ejectment. The tax law of 1893 now in force, contains a similar provision, and we quote that part relating to the consent of the State.

"Sec. 86. In all cases where it shall become necessary, in the prosecution of an action of ejectment by any person holding an adverse claim to any lands hereafter bid in for the State as provided in this act, the Auditor General may be defendant."

Public Acts of 1893, p. 395, Sec. 86.
1 Comp. Laws 1897, Sec. 3909.

The present suit however is not an ejectment suit, and is not within the statute. In 1899 an amendment to the tax law of 1893 was passed, requiring the Auditor General to be a party defendant in actions in State courts to set aside sales for delinquent taxes on lands held as state tax lands.

The section as amended, is as follows:

"Sec. 144. The Auditor General shall be made a party defendant to all actions or proceedings instituted for the purpose of setting aside any sale or sales for delinquent taxes on lands held as State tax lands, or which have been sold as such or which have been sold at annual tax sales, or for purpose of setting aside any taxes returned to him and for which sale has not been made; in all such cases a copy of the bill of complaint or petition shall be served upon the prosecuting attorney at the time of commencing the action, who shall send a copy thereof within five days to the Auditor General, which said service shall be in lieu of the service of process. Upon so being made a party, it shall be the duty of the Auditor General, whenever he shall, in his discretion, deem the same to be expedient, to the end that the State of Michigan may be fully protected, to cause the Attorney General to represent him in such proceedings. In any suit or proceedings instituted for the purposes in this section mentioned, no costs shall be taxed against either party to the action.

This act is ordered to take immediate effect.

Approved June 1, 1899."

Public Acts of 1899, Act 97, Sec. 144, p. 140.

This Act furnishes, we submit, no authority for a suit in the United States Court against the Auditor General, as can be seen upon an analysis of the Act.

First.—The Act compels an owner of the original title although he may be in possession, who institutes an action

to set aside a sale for delinquent taxes, on lands held as state tax lands "or which have been sold as such" to make the Auditor General a party defendant. Now, when State tax lands are sold by the State, the sale conveys the title and interests of the State derived through the sale.

Public Acts of 1893, p. 394, Sec. 84.
1 Comp. Laws, 1897, Sec. 3907.
Public Acts of 1899, p. 431, Sec. 84.

Second.—It requires the service of a copy of the bill of complaint upon the prosecuting attorney at the time of commencing the action;

Third.—It requires the prosecuting attorney to send a copy thereof to the Auditor General, and provides that such service shall be in lieu of the service of process;

Fourth.—The act denies costs to all parties. "No costs shall be taxed against either party to the action."

The act thus requires as a party defendant the Auditor General to represent the State, even though the state has no title or claim, and does not give a warranty deed. It substitutes the service of a copy of the Bill or petition, which ex vi terminorum, is filed in equity, in lieu of service of subpoena, and it requires the substituted service to be made on the prosecuting attorney at the time of commencing the action, and denies costs.

The Supreme Court and circuit and district courts of the United States, have the power to regulate the whole practice to be used in suits in equity.

1 U. S. Comp. Statutes, Sec. 917,
And the statutes of the United States allow taxed costs.
1 U. S. Comp. Statutes, Sec. 823-824.

It follows from the above that the act confers no jurisdiction on United States Courts in equity. As was said in the case of Smith v. Reeves, 178 U. S. 436, "A federal court can neither take nor surrender jurisdiction except pursuant to the constitution and laws of the United States."

The case of Smith v. Reeves, supra, is similar in some aspects to the case at bar and was a suit in California against a state treasurer. A statute of the state was relied upon to sustain jurisdiction. That statute provided that a suit might be brought against the state treasurer to recover taxes paid. It provided for service of process and required the attorney general to defend the action. It provided that the treasurer might demand that the action be tried in the *Superior court of the county of Sacramento.*

The attorney general demurred to the complaint and moved to dismiss the case for want of jurisdiction in the circuit court. The demurrer was sustained with leave to amend and motion to dismiss was denied. An amended complaint was filed, but a demurrer to it was sustained and no further amendment being made the action was dismissed by the circuit court.

The Supreme Court of the United States held that the suit was against the State of California and that there was a want of jurisdiction, and affirmed the order dismissing the complaint. The court said among other things:

"It is quite true the state has consented that its treasurer may be sued by any party who insists that taxes have been illegally exacted from him under assessments made by the state board of equalization. But we think that it has not consented to be sued except in one of its own courts. *This is not expressly declared in the statute, but such, we think is its meaning.* The requirement that the aggrieved tax payer shall give notice of his suit to the comptroller, and the provision that the treasurer may at the time he demurs or answers 'demand that the action be tried in the superior court of the county of Sacramento,' indicates that the state

contemplated proceedings to be instituted and carried to a conclusion only in its own judicial tribunals. If a circuit court of the United States can take cognizance of an action of this character, the right given to the treasurer by the local statute to have the case tried in the Superior court of Sacramento county would be of no value; for, as the jurisdiction and authority of a circuit court of the United States depends upon the constitution and laws of the United States, it could not refuse to take cognizance of the case if rightfully commenced in it, and to proceed to final decree, nor could it, merely in obedience to the laws of the state, transfer it to a state court upon the demand of the state treasurer. A federal court can neither take nor surrender jurisdiction except pursuant to the constitution and laws of the United States."

There is a slight basis for the contention that the State has consented to be sued, to set aside the determination of the Auditor General and Commissioner of the State Land Office, as to tax homestead lands, and as the complainant alleges in the Bill that some of his lands have been "homesteaded, that is, placed on the homestead list," (Rec. p. 97), some consideration is due to this allegation. Such suit to set aside such determination must however be brought in the Circuit Court for the County of Ingham.

Under the tax law of 1893 as amended in 1899, when lands are delinquent for taxes for five years, and have been bid off to the State for the taxes of more than one year, and are held by the State, and no application has been made to pay, purchase or redeem, the lands for taxes, and time for redemption has expired, and no action is pending to set aside the taxes or remove the cloud, and the lands are unoccupied by the person having the record title, then in such case the lands are deemed abandoned, and the statute declares that the "title to the State shall be deemed absolute in and to said lands." The Auditor General and the Commissioner of the State Land Office are to cause an examination to be

made of the lands, and are required to make a finding and determination.

The statute further provides:—

"The finding and determination of the Auditor General and the Commissioner of the State Land Office shall show:

First, A description of said lands;

Second, The years for which they have been returned delinquent for taxes;

Third, The time or times bid off to the State, and the taxes for which said bid was made;

Fourth, Whether said lands are occupied or abandoned;

Fifth, Whether or not any suit is pending in the county where said lands are situated to set aside the taxes, or any of them, or to remove the cloud occasioned thereby.

The determination of the Auditor General and Commissioner of the State Land Office in that regard shall be deemed to be conclusive as to the facts therein stated, unless suit is instituted to vacate the same within six months, as hereinafter provided. Within ninety days after such determination the Auditor General shall make a transfer by deed of all lands so determined by the Auditor General and said Commissioner of the State Land Office to come within the provisions of this section to the State of Michigan as to an individual, as provided in section seventy-two of this act so far as said section is applicable. Said deed or deeds shall be delivered to the Commissioner of the State Land Office, who, after having said deed or deeds recorded in the register of deeds office, of the county where the lands are situated, shall file the same in his office. *Upon the execution and delivery of said deed or deeds to the Commissioner of the State Land Office, said Commissioner shall hold said lands as State lands,* subject to the provisions hereinafter contained."

Public Acts of 1899, page 152, Sec. 127.

The same section 127 however expressly provides, "Any suit instituted for the purpose of setting aside the determination aforesaid may be commenced in the Circuit Court of the County of Ingham."

Lansing, the Capitol is in Ingham County, and the reason for fixing upon the Circuit Court of that County as the Court in which action might be brought, was probably because the law department of the State and the books, records, and papers in the offices of the Commissioner of the State Land Office, are there located. We contend it is clear that the statute confers no jurisdiction on United States Courts as to tax homestead lands.

In any case, all lands on the homestead list, have according to said Sec. 127 as amended, been deeded to the State and are now under the control of the Commissioner of the State Land Office, and the defendants, in this suit, have no concern as to homestead lands. Whatever the construction of the statute as to the consent of the State to be sued as to tax homesteads, there can be no jurisdiction obtained as to the lands when the Commissioner of the State Land Office is not a party.

That the Auditor General and the other defendants have no control over or official connection with tax homestead lands appear from the statute, and the decision thereon of the Supreme Court. Under the statute the abandoned lands are deeded to the state by the Auditor General "as to an individual."

Public Acts of 1893, Act 206, Sec. 127.
Public Acts of 1899, Act 107, Sec. 127.

Said section 127 as amended in 1899 further provides: "Upon the execution and delivery of said deed or deeds to the Commissioner of the State Land Office, said Commissioner shall hold said lands as state lands, subject to the provisions hereinafter contained."

The Supreme Court of the State in 1902 passed upon these sections quoting them in part, in a suit where the Commissioner of the State Land Office asked for a writ of prohibition to prohibit the Auditor General from cancelling deeds issued under the homestead provisions of the tax law, and it was held the Auditor General had no control over such lands.

State Land Office Com. v. Auditor General, 91 N. W. Rep. 153.

Even if in this case, all the tax statutes appeared to be unconstitutional, which is not at all conceded, the contention still remains that this is a suit against the State.

State of Louisiana v. Steele, 134 U. S. 230.

The question whether or not this is in effect a suit against the State of Michigan, may be raised by demurrer.

Ill. C. R. Co. v. Adams, 180 U. S. 28.

Want of Equity in the Bill.

Moot Questions.

There is no equity in abstract, academic, or moot questions, and it has been held that the duty of the Court is limited to determining rights of persons or of property, which are actually controverted in the particular case before it.

Williams v. Hagood, 98 U. S. 75.
Tyler v. Judges, 179 U. S. 405.

Applying the above rule to the allegations of the bill, several questions are eliminated.

Board of State Tax Commissioners.

The Board of State Tax Commissioners is attacked in the Bill.

Rec. p. 98, par. 28, sub. 6a to 6n.

The Board was not created until in June, 1899, a short time before the filing of the original bill herein.

Public Acts of 1899, Act 154, p. 227.

No showing in particular is made in the Bill that this Board has interfered with Complainant or his property, and the act creating the Board has been declared constitutional.

Board of State Tax Commrs. v. Board of Assessors, 124 Mich. 491.
Board of State Tax Commrs. v. Quinn, 125 Mich. 128.

National Banks.

Rec. p. 105, par. 43.

The connection of complainant with a national bank, or moneyed capital is not shown in the Bill, and the allegation as to the taxation of stock of national banks, raises only a

moot question. There is no discrimination in the law against national banks.

Public Acts of 1893, p. 359, Sec. 14, Sub. 3.

Non-Residents.

Rec. p. 109, par. 55.

Complainant is a resident of the State, and if the allegation be true that non-residents are taxed higher than residents, complainant has not been injured.

Situs of Personal Property.

Rec. p. 92, par. 22.

Complainant alleges that personal property under the tax law is assessed,—

1. At the residence of the owner.
2. At the situs of the property.
3. At the destination thereof.

Complainant points out none of his personal property which has been "assessed variously". A state can fix the situs of personal property.

Columbus Southern Ry. Co. v. Wright, 151 U. S. 470.

Bristol v. Washington Co., 177 U. S. 133.

Western Assur. Co. v. Halliday, 126 Fed. Rep. 257.

Curative Provisions.

Rec. p. 95, par. 27.

Complainant does not point out in the Bill any particular notice, form or record of which he has been deprived by the curative provision of the tax law. Allegations of law are not admitted by demurrer, and the State Supreme Court construes the curative section so that it does not deprive any tax payer of a hearing and does not cure jurisdictional defects.

Auditor General v. Chandler, 108 Mich. 569.
1 Comp. Laws, 1897, Sec. 3922 and notes.

Discrimination.

Rec. p. 96, par. 28.

Section 19 of Act 206 of Public Acts of 1893 is alleged to discriminate against property and individuals, and it is averred that Banks and other corporations can deduct their indebtedness from the gross amount of their personal property, while an individual can only deduct his debts from his credits.

This Sec. 19 which is Sec. 3842 of Compiled Laws of 1897 was declared unconstitutional by the Supreme Court in February, 1901, but it was held that the tax law was valid, and property could be taxed under Sec. 3831 of Compiled Laws of 1897.

Public Acts of 1893, p. 356, Sec. 8.
Citizens St. R. Co. v. Common Council, 125 Mich. 673-694.

Redemption.—Penalty.

Rec. p. 105, par. 46.

An attack is made upon the tax law of 1893 because the amendment of 1897 permits an additional time to a land holder to retain his real estate by paying to the holder of the tax deed, the sums he paid to the State on purchasing the tax title, and 100 per cent additional.

Cheever v. Flint Land Co., 96 N. W. Rep. 933.
Public Acts of 1897, Act 229.
Public Acts of 1899, Act 204.

This provision of the law does not concern complainant, because he avers in the Bill that "no third person has by reason of said taxes acquired any right" to any of said lands.

Rec. p. 108, par. 52.

Complainant can buy of the State without paying the 100 per cent.

Public Acts of 1899, Act 262, p. 431.

Moreover there is no right of redemption from a tax sale, except as permitted by statute.

Dumphey v. Hilton, 121 Mich. 315.
Kelly v. Sanders, 99 U. S. 441.

Credit of State.

Rec. p. 105, par. 45.

The constitution of the State provides: "The credit of the State shall not be granted to or in aid of any person, association or corporation."

1 Compiled Laws 1897, p. 115.
Art. XIV. Sec. 6.

It is claimed that the tax law violates the constitution, and we quote what we think is alleged as obnoxious:

"If a sale made under this act is set aside by any court or is canceled by the Auditor General as provided in this act, the Auditor General shall refund to the purchaser the amount paid at the time of the sale, with interest thereon at the rate of six per cent per annum from the time of the purchase to the time when said sale was set aside or canceled, out of the general fund of the State. In such case the Auditor General shall charge back to the county all taxes and the interest and charges thereon for all years for which it has been held that the taxes were invalid or the description erroneous, but for all years for which no invalidity has been found he shall proceed to enforce the collection of the taxes for all years refunded as herein provided, as in the case of taxes for which sale has not been made."

Public Acts 1899, Act 262, Sec. 73, p. 430.

This subject is classed with moot questions, because it is no concern of the complainant that the State returns to a purchaser of tax lands, his money and interest when the tax title is held void. The credit of the State has nothing

to do with the matter. Before the amendment of 1899 the Supreme Court had considered the statute.

Auditor General v. Patterson, 122 Mich. 39.

Complainant also avers that "no third person has, by reason of said taxes, acquired any right" to said lands. Rec. p. 108.

Method of Sale.

Rec. p. 104, par. 39.

It is averred that the method of sale of land may result in a purchaser becoming a joint owner with complainant. Allusion is probably made to the statute, requiring the sale to be made to the person "paying the full amount charged against such parcel and accepting a conveyance of the smallest undivided fee simple interest therein."

Public Acts 1893, p. 388, Sec. 70.
Public Acts 1897, p. 286.

Complainant shows no personal interest in this particular, because no undivided portion of the lands has been bid to the State, and no third person has acquired any rights in the land.

Rec. p. 108, par. 52.

Sale of State Tax Lands.

Rec. p. 104, par. 40.

We submit that the allegation that the owner of the original title should have a preference in the purchase of lands bid to the State involves no question for a Court.

Alleged Lack of Uniformity of Tax Laws.

Rec. p. 105 to 108, par. 47-48.

The tax law of 1893 is attacked in the bill upon the alleged grounds that there are different methods of assessment and collection of taxes, and sale of lands, which prevail in different cities and villages, and the Grand Rapids charter is referred to, and several sections quoted.

It is provided in the tax law of 1893, as follows:—

"In cities where some special provision is made for demand or collection of taxes, the collector or treasurer shall comply with such special provision, otherwise be bound by the provisions of this Act."

Public Acts of 1893, p. 374, Sec. 46.

It is further provided:—

"This act shall be applicable to all cities and villages when not inconsistent with their respective charters."

Public Acts of 1893, p. 401, Sec. 107.

The charter of Grand Rapids is found in the Local Acts of 1897, commencing at p. 387. The matter of taxation for general purposes is under Title VIII, p. 461-475, covering

42 sections. Sec. 1 provides for a Board of Assessors. Sec. 2 requires the Board before the first Monday in April in each year to assess all real and personal property within the corporate limits at its "true cash value," and make assessment rolls. Sec. 4, provides for review and appeal. Secs. 5 and 6 provide for review by Common Council and confirmation of rolls, and these rolls "remain as the basis for all taxes to be levied and collected until another assessment." Under section 10 the Council determines the amount to be raised for municipal purposes, and the board of assessors assess the amount as provided in Sec. 11, which requires copies of the assessment rolls to be made, and the taxes are ratably assessed on "The City Tax Rolls", and if taxes are delinquent on lands, the provisions quoted in the Bill apply. Rec. p. 106 citing Secs. 21-22-23 of the charter. The sale of lands for delinquent City taxes is not under any decree of a Court, and this is made the basis of Complaint. Rec. p. 107, Sec. 47.

Now, under Sec. 35 p. 474, it is made the duty of the Board of Assessors to make copies of all assessment rolls as confirmed, and upon them to "ratably assess the State, County and school taxes as provided by the general laws of the State," and as there is nothing in the charter as to these last above mentioned taxes inconsistent with the State law, the provisions of the State law apply, and delinquent State, County and school taxes, are necessarily returned to the Auditor General.

The assessment or valuation of all property in the City of Grand Rapids is at its true cash value. The charter makes no discrimination. The assessment is uniform with the assessment throughout the State.

The municipal and State and County taxes are ratably levied, and there is absolute equality. The difference between the charter and the general tax law is that as to delinquent city taxes. The City Treasurer advertises and

sells the land without any decree of a court, and the proceedings are completed by a deed signed by the Mayor.

But the law permits the City authorities to provide for judicial procedure for collection of City taxes. We quote the provision of law in this regard:

"The authorities of any city or village which, by its charter. has the right to sell lands for unpaid taxes or assessments, may provide for judicial sale of such lands. Such sale shall be made on petition filed in behalf of the City or village in interest, and shall conform, as near as practicable, to the provisions as to sale in this act: Provided, That whenever any lands are offered at such sale that have been bid to the State at any tax sale made under the provisions of any general tax law, and upon which such bid or bids remain undischarged, any sale made of such lands at the city tax sale shall be conditioned upon the payment of the tax lien held by the State on said land, and the sale so made shall be void if the tax lien held by the State shall remain unsatisfied."

Public Acts of 1897, p. 262.
1 Comp. Laws of 1897, Sec. 3931.

It is not pointed out in the Bill how the charter violates the State Constitution. The provisions of the tax law of the State in Sec. 107 quoted above will be found in every tax law providing for judicial procedure.

Public Acts of 1882, p. 35, Sec. 95.
Public Acts of 1889, p. 265, Sec. 96.
Public Acts of 1891, p. 318, Sec. 93.
Public Acts of 1893, p. 410, Sec. 107.

During all these years the Supreme Court of the State has discovered no violation of the Constitution. It has enforced charter rights of tax payers in a city as to sessions of Board of Review, when the charter and general law were different.

Common Council v. Smith, 99 Mich. 507.
Aud. Genl. v. Sessions, 100 Mich, 343.

Charters where they are inconsistent with the general law, operate with equality and uniformity on all property within the corporate limits and all owners thereof, and there is we submit no violation of the 14th Amendment.

Bowman v. Lewis, 101 U. S. 22.

Bowman v. Lewis, supra, was a case arising in the State of Missouri. By the constitution and laws of Missouri an appeal lay to the Supreme Court of that state from the final judgment or decree of any circuit court, except the circuit courts of St. Charles, Lincoln, Warren and St. Louis, and the city of St. Louis. For the last mentioned counties and city, the constitution established a separate court of appeal called the St. Louis court of appeals, to which was given exclusive jurisdiction of all appeals from the writs of error to the circuit courts of those counties and of said city. From the St. Louis court of appeals an appeal was allowed to the Supreme Court only in certain cases where the amount exceeded the sum of $2,500, and other cases not necessary to be mentioned. No appeal was given to the Supreme Court in a case like the Bowman case arising in the counties referred to and in the city of St. Louis, but a similar case arising in the circuit courts of any other county would be appealable directly to the Supreme Court. It was claimed that this feature of the judicial system of Missouri was in

conflict with the fourteenth amendment of the constitution of the United States, because it denied to suitors in the courts of St. Louis and the counties named the equal protection of the law. It was held by Justice Bradley, delivering the opinion of the court, that the true ground on which the case arose was the undoubted power of the state to regulate the jurisdiction of its own tribunals for the different portions of its territory in such manner as it saw fit, subject only to the limitations therein before referred to.

In delivering the opinion, Justice Bradley among other things said:

"There is nothing in the constitution to prevent any state from adopting any system of laws or judicature it sees fit for all or any part of its territory. If the state of New York, for example, should see fit to adopt the civil law and its method of procedure for New York City and the surrounding counties, and the common law and its method of procedure for the rest of the state, there is nothing in the constitution of the United States to prevent its doing so. This would not, of itself, within the meaning of the fourteenth amendment, be a denial to any person of the equal protection of the laws. If every person residing or being in either portion of the state should be accorded the equal protection of the laws prevailing there, he could not justly complain of a violation of the clause referred to, for, as before said, it has respect to persons and classes of persons. It means that no person or class of persons shall be denied the same protection of the laws which is enjoyed by other persons or other classes in the same place and under like circumstances. The fourteenth amendment does not profess to secure to all persons in the United States the benefit of the same laws and the same remedies. Great diversities in these respects may exist in two states separated only by an imaginary line. On one side of this line there may be a right of trial by jury, and on the other side no such right. Each state prescribes its own modes of judicial proceedings.

* * * Where part of a state is thickly settled, and another part has but few inhabitants, it may be desirable to have different systems of judicature for the two portions,—trial by jury in one, for example, and not in the other. * * * It would be unfortunate restriction of the powers of the state government if it could not, in its discretion, provide for these various exigencies."

Retrospective Laws.

Rec. p. 109, par. 54.

It is averred that the tax laws of 1889. 1891 and 1893, in so far as they purport to operate retrospectively, are unconstitutional. It is claimed that these laws impose terms, conditions, penalties and procedure, not imposed by the laws which were repealed.

The State Supreme Court holds that interest may be increased, and period of redemption shortened.

Webster v. Auditor General, 121 Mich. 668.
Muirhead v. Sands, 111 Mich. 488.

A State may adopt new remedies, and apply them to taxes already delinquent, and a statute is not in conflict with the constitution because it is retroactive.

League v. State of Texas, 184 U. S. 156.

Injunction and Appeal.

Rec. p. 110, par. 57.

Complainant avers that he is denied relief, except as it is found in Sec. 70. Public Acts 1893, p. 388. But Section 70

follows Section 66, which allows any person to file objections to any tax and have a hearing, and under Sec. 79, he can file objections to confirmation of sale. He has full opportunity for defense.

The Supreme Court has held that the Legislature had constitutional authority to take away remedy by injunction.

Eddy v. Township of Lee, 73 Mich. 123.

The right of appeal is purely statutory.

Ex parte McCurdle, 7 Wall. 506.
Sullivan v. Haug, 82 Mich. 548.
Public Acts of 1893, p. 385, Sec. 67.

Curative Provisions of Tax Laws.

Rec. p. 95, par. 27.

It is alleged that the curative provisions of the tax laws prejudice Complainant, and contravene the State and National constitution, and as construed by the Court, deny a hearing to the tax payer.

The curative section of the law of 1893 is to be found in Public Acts of 1893, page 399, Sec. 99, or 1 Compiled Laws, 1897, Sec. 3922, p. 1243.

The Supreme Court of the State has held that jurisdictional defects are not covered by the curative provisions.

Caledonia Township v. Rose, 94 Mich. 218.
Benedict v. Aud. General, 104 Mich. 269.

Many cases of fatal defects in tax proceedings are given in the notes to 1 Compiled Laws, 1897, Sec. 3922.

Petition of Auditor General.

Rec. p. 96, par. 28, Sub. 3.
Rec. p. 102, par. 35, Sub. 17.

It is averred that the Auditor General violated the tax law of 1893 by including in his petition for decree and sale, lands of complainant held on State bids.

The law provides, "Lands hereafter bid off in the name of the State and thus held shall not be included in such petition."

Public Acts of 1893, p. 381, Sec. 61, Amended.

This averment does not show a denial by the State of any rights of the Complainant. Under the law as construed by the Supreme Court, the Complainant could have appeared and made his defense or even moved to set aside the sale.

Conn. Mut. Life Ins. Co. v. Wood, 115 Mich. 444.

The proceedings in this respect have been held not subject to collateral attack in an exhaustive opinion of the Supreme Court.

Savings Bank v. Ward, 118 Mich. 87.
Hoffman v. Pack Woods & Co., 123 Mich. 74.
Munroe v. Winegar, 128 Mich. 309.

Munroe v. Winegar, supra, was a case where the holder of a tax title filed a bill to quiet his title, and it was held that this question could not be raised.

The tax law of 1889 was attacked as unconstitutional and void.

"Because said petition does not show the jurisdictional fact that no sale of the lands described therein for non-payment of taxes has been made, as is contemplated by section 71 of the tax law of 1889."

Justice Cahill, delivering the opinion of the Court said:

"The last point made by defendant, that the petition does not state the fact, claimed to be jurisdictional, that a sale of the lands described therein has not been made, is without force. The form of the petition, so far as the facts necessary to be stated is concerned, is prescribed by section 52 of the act, and the petition in this case contains all the statutory requirements."

Auditor General v. Sloman, 84 Mich. 118.

The rule seems to be the same in the federal courts, where even if the record fails to show affirmatively jurisdiction, the judgment is not a nullity or subject to collateral attack by a party to the suit.

Dowell v. Applegate, 152 U. S. 339.

Printing.—Advertising.

Rec. p. 100, par. 30-31.

The Constitution of the State, provides as follows:—

"The legislature shall provide by law that the furnishing of fuel and stationery for the use of the state, the printing and binding the laws and journals, all blanks, paper and printing for the executive departments, and all other printing ordered by the legislature, shall be let by contract to the lowest bidder or bidders, who shall give adequate and satisfactory security for the performance thereof."

Constitution Art. IV. Sec. 22.
1 Comp. Laws, 1897, p. 82.

It is alleged that printing required by the tax laws is not let by contract as required by the constitution. What is required by the tax law of 1893, is found in Public Acts of 1893, p. 383, Sec. 62, 63, 65-66. Under these sections the Auditor General is required to publish in a newspaper in each county where the petition is filed, a copy of the order of hearing, and a copy of the petition containing the list of lands delinquent for taxes.

Sec. 65. provides:

"The cost of such advertising shall in no case exceed the sum of forty cents for each description of land so advertised and sold, and shall be paid by the State Treasurer, upon the warrant of the Auditor General, out of the general fund of the State."

The particular words "blanks, paper and printing for the executive departments" in the Constitution, are followed by "and all other printing ordered by the legislature."

The publication and advertising required by the statute, we submit is not ejusdem generis with blanks, paper or printing.

Reiche v. Smythe, 13 Wall. 162.
Brooks v. Cook, 44 Mich. 617.

The charge of 70 cents set up in paragraph 31 of the Bill has been sustained by the Supreme Court.

Sayers v. O'Connor, 124 Mich. 256.

Collection Fee and Interest.

Rec. p. 100-101, par. 32-33.

Complainant makes complaint that the collection fee is a double charge, and that the interest imposed on delinquent taxes is an unreasonable penalty.

The State Supreme Court has sustained an amendment to the tax law of 1893, which increased the interest on delinquent taxes.

Webster v. Aud. Gen'l, 121 Mich. 668.

Interest is a question entirely of State statute, as are also penalties and collection fees.

Morley v. L. S. & M. S. R. Co., 146 U. S. 162.
W. U. Tel. Co. v. State of Indiana, 165 U. S. 304.

Irregularities.

Rec. p. 101-2-3, par. 35, sub. 1 to 38.

Reasons for alleging the invalidity of taxes are given in par. 35 of the bill which contains 38 subdivisions. While alleging irregularities going to the amount of the tax generally, Complainant has paid none of the taxes or any part thereof. The allegations of excessive taxation, impliedly admit something due which has never been paid. Complainant cannot for this reason, we submit, claim any relief. Bank v. Marye, 24 Sup. Ct. Rep. 68. As to each and all of the said allegations, the tax laws have afforded Complainant an opportunity for relief, of which he has not availed himself. The tax law as we have shown provides for a Board of Review, for payment under protest, for a hearing, and a day in Court, and a right to present objections. Under the tax law

of 1893, a tax payer can appear before the Board of Supervisors, and the law provided, "They shall hear and duly consider all objections made to raising any such moneys by any tax payer to be affected thereby."

Public Acts of 1893, Act 206, Sec. 37.

The curative provisions of the tax statutes cover many irregularities.

Public Acts 1893, p. 399, Sec. 99.
1 Comp. Laws, 1897, Sec. 3922.

The allegations, Rec. p. 101-102-103 in subdivisions (a), (b), (c), and subdivisions 2 and 3-5-7, 10 to 15 and 19 to 38, could have been set up as a defense in the suits brought by the Auditor General.

Auditor General v. Sparrow, 116 Mich. 591 to 593.

But lack of equalization and apportionment alleged in Sub. 5 would not affect township taxes, special school taxes, road tax, bridge or building tax.

Auditor General v. Hill, 98 Mich. 326.
Auditor General v. Gurney, 109 Mich. 472.

The tax law expressly provides for adding not more than one per cent for the contingent fund to the amount of the several taxes for the purpose of avoiding fractions in computation, and the allegation in subdivision 4 of par. 35, shows no illegality.

Public Acts of 1893, p. 372, Sec. 39.

Subdivisions 8 and 9, Rec. p. 102, aver that lands have not been assessed in the name of the owner, and no warrant was attached to rolls, but such irregularities are cured by the statute.

Public Acts of 1893, p. 399, Sec. 99.
Hill v. Graham, 72 Mich. 659.
City of Menominee v. Lumber Co., 119 Mich. 201.

The purpose of the tax law under the judicial procedure acts is to foreclose the lien of the state, and have an adjudication upon the validity of taxes, and nearly all matters alleged in paragraph 35 of the Bill of Complaint were foreclosed by the decree.

Auditor General v. Sparrow, 116 Mich. 584.
Berkey v. Burchard, 119 Mich. 101-105.
Winona & St. P. Land Co. v. Minnesota, 159 U. S. 526.

Manner of Sale.

Rec. p. 104, Sec. 38-39-40.

The manner of levying and collection of taxes is wholly within legislative control.

Witherspoon v. Duncan, 4 Wallace, 210.
Del Castillo v. McConnico, 168 U. S. 674.

Equalization by Board of Supervisors.

Rec. p. 104, Sec. 41-44.

The equalization provided for by the law is alleged to deny to Complainant the equal protection of the law. There is

no discrimination however in the law. It operates on all alike, every where throughout the State. The proceedings which lead up to equalization and the equalization, are in substance as follows:—

The law as to the assessment roll does not require a specification of the articles of personal property, assessed. It would be practically impossible to comply with a requirement of such an itemized assessment. It is generally sufficient for the roll to describe personal property by the word "personal."

Public Acts 1893, p. 368, Sec. 26.

Real estate however is described in sections or subdivisions thereof, or by lots and blocks where platted.

Public Acts 1893, p. 367, Sec. 25.

The assessment of acreage property must show the number of acres. (Sec. 24.)

At the October session of the Board of Supervisors, the several rolls are examined to ascertain whether the relative valuation of the real property in the townships, wards, or cities has been equally and uniformly estimated, and the board is required to equalize the same by adding to or deducting from the valuation of the taxable property in any township such an amount as will produce relatively an equal and uniform valuation of the real property.

Public Acts of 1893, p. 370, Sec. 34.

The law contemplates an equalization with reference to real estate. It does not assume that the assessments of real

and personal property made by any supervisor, are relatively unequal or unjust, and leaves the burden or benefit of any increase or diminution made by the board in the total assessment of the township to be shared alike by both realty and personalty.

Sinclair v. Learned, 51 Mich. 343.
Boyce v. Sebring, 66 Mich. 217.

We submit that the law shows no denial of the equal protection of the law.

Walston v. Nevin, 128 U. S. 578.

Classification.

Rec. p. 105, Sec. 42.

Complainant shows no equity in his attack on the tax law charging lack of classification.

The law classifies property for taxation, into:

1. Real property.
2. Real estate exemptions.
3. Personal property.
4. Personal property exempted.

Public Acts of 1893, p. 354 to 358.

Remedy at Law.

It will be conceded we hope that the Complainant during the many years that his lands have been taxed and sold, could waive constitutional or other rights, and the query

arises, whether he could omit the exercise of rights under the tax laws until the time has passed for such exercise, and then petition for redress in equity on the ground of absence of remedy at law.

The Bill admits, Rec. p. 91, par. 17, that review of assessments was provided for by the laws, and we aver that all the tax laws gave a right of hearing as to the assessment.

1 Session Laws, 1869, p. 334, Sec. 20.
1 How. Ann. Statutes, Sec. 1020.
Public Acts of 1882, p. 13, Secs. 18, 19.
Public Acts of 1885, p. 181, Secs. 18, 19.
Public Acts of 1889, p. 237, Secs. 18, 19-20.
Public Acts of 1891, p. 289, Secs. 19-20-21.
Public Acts of 1893, p. 368, Secs. 28-29-30.

These provisions as to days for hearing and review have been held by the Supreme Court to be mandatory.

Auditor General v. Merritt Chandler, 108 Mich. 569. (Citing cases.)

The Supreme Court of the State has held that one may waive his right to appear before the Board of Review, and that he must exhaust his remedy before the Board of Review before he can be heard in the Courts.

Savings bank v. City of Detroit, 107 Mich. 246.
Savings Bank v. City of Detroit, 114 Mich. 81.
Caledonia Tp. v. Rose, 94 Mich. 218.
First Nat. Bk. v. St. Joseph, 46 Mich. 526.

In the case of Savings Bank v. City of Detroit, 107 Mich.

Mr. Justice Grant, delivering the opinion of the Court said, p. 247:

"It is unnecessary to cite the numerous authorities of this court to the proposition that boards of review are the proper tribunals for the correction of unjust assessments, and that parties will not be heard in the courts until they have exhausted their remedy before these tribunals."

In the case of First Nat'l Bank v. St. Joseph, supra, Justice Campbell, delivering the opinion of the Court said, p. 530:

"If a person does not see fit to have his assessment corrected and perfected, when it is in his power to do so, it must be assumed that a failure to complain is equivalent to an admission of correctness."

It is undoubtedly true that the supervisor, when acting as assessor, is a quasi judicial officer.

Meade v. Haines, 81 Mich. 261.

We submit however that the objection that the Supervisor under one tax law can review his own assessment roll, and under other tax laws, with two electors can act as a Board of Review, raises no federal question. This position we think is supported by the case of,

Hibben v. Smith, 24 Sup. Ct. Rep. 89.

One objection in the case of Hibben v. Smith, supra, was that assessments for a local improvement were confirmed by a board of trustees, and that the board of trustees were tax payers, and two members thereof were lot owners abutting on the improvement.

Mr. Justice Peckham delivering the opinion of the Court, said p. 91:

"The provisions of the 14th Amendment do not cover such an objection as is now under consideration. The general system of procedure for the levying and collection of taxes which is established in this country is, within the meaning of the Constitution, due process of law."

And again at p. 92, he said:

"The 14th Amendment, it has been held, legitimately operates to extend to the citizens and residents of the states the same protection against arbitrary state legislation affecting life, liberty, and property as is offered by the 5th Amendment against similar legislation by Congress; but that the Federal courts ought not to interfere when what is complained of amounts to the enforcement of the laws of a state applicable to all persons in like circumstances and conditions, and that the Federal courts should not interfere unless there is some abuse of law amounting to confiscation of property or a deprivation of personal rights, such as existed in the case of Norwood v. Baker, 172 U. S. 269, 43 L. ed. 443, 19 Sup. Ct. Rep. 187."

Payment Under Protest.

Under all the tax laws since the act of 1869, payment of taxes on real estate claimed to be illegal, could be paid under protest, and suit brought against the Township to recover the money. The tax payer was required to specify in writing the grounds of such protest.

Public Acts of 1882, Act 9, Sec. 42.
Public Acts of 1885, Act 153, Sec. 42.
Public Acts of 1889, Act 195, Sec. 41.
Public Acts of 1891, Act 200, Sec. 42.
Public Acts of 1893, Act 206, Sec. 53.
Public Acts of 1901, Act 130, Sec. 53.
1 Comp. Laws 1897, Sec 3876.

We quote the part of Section 53 of the Act of 1893, as amended in 1901, as to payment under protest:

"Sec. 53. Any person may pay the taxes, or any one of the several taxes on any parcel or description of land, or on any undivided share thereof, and the treasurer shall note across the face of the receipt in ink any portion of the taxes remaining unpaid. He may pay any tax, whether levied on personal or real property, under protest, to the treasurer, specifying at the time in writing, signed by him, the grounds of such protest, and such treasurer shall minute the fact of such protest on the tax roll and in the receipt given. The person paying under such protest may, within thirty days and not afterwards, sue the township for the amount paid, and recover, if the tax is shown to be illegal for the reason shown in such protest."

State, County and Township taxes on real estate can be recovered of the Township.

Daniels v. Township of Watertown, 55 Mich. 376.

Day in Court.

Under the judicial procedure acts for the collection of taxes, the complainant has been entitled to his day in Court to contest the validity of taxes.

Public Acts of 1882, Act 9, Sec. 57.
Public Acts of 1889, Act 153, Sec. 56.
Public Acts of 1891, Act 200, Sec. 56.
Public Acts of 1893, Act 206, Sec. 66, p. 384.

The Michigan reports contain many cases in which the rights of tax payers have been protected. It was said in the case of Chicago & A. R. Co. v. Wiggins Ferry Co., 108

U. S. 18, "The presumption in all cases is that the Courts of the States will do what the constitution and laws of the United States require." Constitutional questions can be decided in State Courts, and under the statutes of the United States, the decision of the State Court denying the constitutional rights properly pleaded, can be reviewed in the Supreme Court of the United States.

Smith v. Reeves, 178 U. S. 436.

Opportunity to buy State Tax Lands for 25 per cent of the Taxes.

In 1881, an act was passed entitled, "An Act to provide for the sale of State tax lands."

Public Acts 1881, Act 229, p. 271.

This act offered for six months state tax lands for sale to the owner of the original title on payment of original taxes and simple interest thereon at the rate of seven per cent without other charges. After six months any person could purchase on the same terms. This statute was an offer to remit the penalties, and charges and accept simple interest. The act covered all state tax lands acquired by virtue of original and subsequent sales to the State prior to 1881.

Thereafter in 1882, the judicial procedure act of 1882 was passed, which introduced a foreclosure of the lien in chancery, and with an evident desire to clear off the books of the State of state claims and titles, the Act of 1881 was amended in 1882 and four new sections added, whereby a diminishing scale of prices was fixed for state tax lands, and any person could purchase on the first day of October 1883, and for some time thereafter, state tax lands for taxes prior

to 1880 for one-fourth of the original taxes, without interest or charges.

Public Acts 1882, Act No. 7, p. 4.

Another opportunity to purchase state tax lands at auction was afforded by the tax law of 1889, which provided for the sale of lands bid off to the State for taxes of 1886 and previous years. A bid at this auction was required to be equal to 25 per cent of the amount chargeable against the land.

Public Acts of 1889, Act 195, Sec. 71, p. 257-8.

This provision of the Act of 1889 has been held valid.

Auditor General v. Bay Co. Supervisors, 106 Mich. 662-675.

Having waived all the opportunities offered by the tax laws, such as suing at law to recover taxes paid under protest, and having failed to appear and object under the judicial procedure acts, and having declined the offer of the State to sell state tax lands prior to 1881, and also prior to and including 1886, at a discount of 75 per cent, how can Complainant now invoke the aid of a Court of Equity under a statement that the laws are unconstitutional? When a party has failed to make a proper defense at law through negligence, equity will not aid him.

Hungerford v. Sigerson, 20 How. 156.

Alleged Premature Decree.

The Bill alleges Rec. p. 102, par. 35, sub. 18, "that in each of the above proceedings for the taxes of each of said years, the decree was made prematurely, and the Court thereby, if it ever had acquired, lost jurisdiction of said proceedings and the sales thereunder are entirely void."

This allegation we submit contains no fact whatever. Alleging that a "decree was made prematurely" is an averment *of a conclusion of law.* The facts making the decree premature are not mentioned.

This allegation in the bill can be imagined to be based on the provision of the tax laws as construed by the State Supreme Court, requiring five full court days to elapse in term before a decree could be taken against land. The provision is in substance as follows in three of the tax laws:

"If within the first five days after the day fixed in such notice for the hearing of such petition it shall be made to appear to the court that any person has been prevented from filing objections to any tax, without fault on his part, such further time may be granted for that purpose as may seem proper, not exceeding five days."

Public Acts of 1889, Act 195, Sec. 56.
Public Acts of 1891, Act 200, Sec. 56.
Public Acts of 1893, Act 206, Sec. 66.
Amended in other respects.
Public Acts of 1895, p. 310, Sec. 66.

The period of time was further limited by an amendment taking effect in 1899, and the law then became as follows:

"If on the day fixed in such notice for the hearing of such petition or on the day following that day, it shall be made to appear to the court that any person has been prevented from filing his objections to any tax without any fault on his

part, such further time may be granted for that purpose as may seem proper, not exceeding five days."

Public Acts of 1899, p. 436, Sec. 66.

The Amended Bill was sworn to in February, 1902.

Cases have been decided by the Supreme Court, holding decrees void which were rendered before Court had been in session five days.

Peninsular Savings Bank v. Ward, 118 Mich. 87, 92.
Youngs v. Clark, 120 Mich. 528.
McGinley v. Calumet etc. Min. Co., 121 Mich. 88.

Other cases have been decided, wherein the Court by reason of different state of facts, have decided the decrees to be valid.

Gates v. Johnson, 121 Mich. 663.
Brown v. Mining Co., 123 Mich. 117.
Brown v. Napper, 125 Mich. 117.

In Brown v. Mining Co., supra, Justice Long after quoting the law, said p. 118:

"It appears that the time fixed for the hearing of the Auditor General's petition was Tuesday, November 10, 1896. The court convened on that day, and continued to hold regular, daily sessions thereafter until and including Saturday, November 14th, and on that day adjourned until Monday, November 16th, on which day it held its session, and entered the decree upon which the sale of the land was made, and adjourned *sine die*. The landowner neither made nor filed any application for further time in which to file his

objections to the relief prayed for in the Auditor General's petition. The complainant purchased the lands at the regular annual tax sale thereafter. It is the contention of the defendant that it had five full secular days, of 24 hours each (in each of which a session of the court was had), after the day fixed for hearing the petition, in which to apply for further time to file objections, and that no decree could properly be made and entered until the sixth secular day after the hearing.

We think the case is controlled by Gates v. Johnson, 121 Mich. 663 (80 N. W. 709). There the time for hearing the petition was fixed for November 13th. The court was in session November 13th to November 17 inclusive, and adjourned until the next day, but did not appear on the next day (the 18th). The decree was made on the 23rd following. This was held a sufficient length of time for the taxpayer to present his objections, under the statute. In the present case the court was in session continuously from November 10th to the 14th inclusive, and then adjourned until Monday, the 16th, when the decree was made and entered. This was a sufficient length of time fixed by the statute."

The necessity for averring facts is illustrated by these cases. A demurrer admits only facts well pleaded. When the facts in regard to these several decrees in the case at bar appear, it may be that the opinion of the pleader that they are premature will be held to be as baseless as the contention in the case of Brown v. Mining Co., supra.

Even if sufficient facts had been averred to show under the statute a premature decree, still the lien of the State for taxes continues until the taxes are paid or extinguished.

Public Acts 1893, p. 372, Sec. 40.
Public Acts 1893, p. 380, Sec. 60.
Auditor General v. Newman, 97 Mich. 703 (1903).

Statute as to Cash Value.

Complainant avers that the legislative definition of cash value lays down a rule different from that prescribed by the constitution, and that by reason of the application of the legislative definition, his property has been assessed at a value greater than the true cash value.

Rec. p. 88, par. 11.

This averment undoubtedly has reference to the constitution of the State which requires assessments on property to be at its "cash value."

1 C. L. of 1897, p. 116.
Constitution of Michigan, Art. XIV, Sec. 12.

It also has reference to the tax laws, excluding forced or auction sales, in estimating the cash value of property.

Session Laws of 1869, Sec. 13.
Session Laws of 1869, Sec. 25.
1 How. Ann. Statutes, Sec. 1013-1025.

The tax law of 1869 above referred to required a certificate to the assessment roll, wherein the supervisor was to certify as to property assessed, that he had "estimated the same at what I believe to be the true cash value thereof, and not the price it would sell for at a forced or auction sale."

The reason for this requirement of the statute is given in two Michigan cases.

Silsbee v. Stockle, 44 Mich. 561.
Dickison v. Reynolds, 48 Mich. 158.

In Silsbee v. Stockle, supra, Mr. Justice Cooley, quoting the section of the statute above referred to, said at p. 566:

"The early statutory form did not contain the words which the supervisor has omitted (Comp. L. 1857, § 806), and the change in the form was made in a revision of the tax law in 1869. If the change in the form whereby these words were brought into it had no important purpose in view, we may well hold that the proceedings are not affected by the supervisor continuing the use of the form which had been in use before. But it is a matter of common knowledge that the change was made for the very purpose of effecting an important change in the assessments. It was notorious that supervisors had been in the practice of evading the previous law and making assessments at a mere fraction of the real value of the property, when sworn to make it at the cash value. It was very easy to excuse the evasion of duty under the pretense that the cash value of property was only what it would bring if forced upon the market; and the law was amended for the very purpose of taking away this excuse."

As the very purpose of the statute was to enforce the constitutional provision as to cash value, and as it operated over the whole state, we submit there was equal protection of the law awarded thereby to the Complainant, and he was not deprived of his property without due process of law, and that the execution of the law would not cause his property to be assessed above its cash value.

Alleged Excessive Assessments.

The Complainant makes complaint of excessive valuations of his property.

Rec. pp. 89-90, par. 14-15-16.

Excessive assessment is not generally a matter for Courts to try, as the tax laws of Michigan have all provided for a

review of the assessments by the supervisor or boards of review.

Williams v. Saginaw, 51 Mich. 120.
Brown v. Grand Rapids, 83 Mich. 101.
Township of Caledonia v. Rose, 94 Mich. 216.

In the case of Township of Caledonia v. Rose, supra, it was said by Justice Grant, speaking for the Court, at p. 218.

"This board of review is a tribunal provided by law, in which the tax-payer may appear to contest an unequal or excessive assessment. Failing to appear there, he is estopped to assail the assessment afterwards. Comstock v. Grand Rapids, 54 Mich. 641; Peninsula Iron & Lumber Co. v. Crystal Falls, 60 Id. 510; Williams v. Saginaw, 51 Id. 120; First National Bank v. St. Joseph, 46 Id. 526."

The rule in this regard is the same in the United States Courts.

Under the Act of 1893, courts will interfere in case of fraud.

Iron Co. v. City of Negaunee, 116 Mich. 430.

The allegation, Rec. p. 92, as to the assessments being fraudulent, if made in due time, could have been remedied by the State Court in equity. The Complainant however would have been required to pay in advance what was justly due.

Merrill v. Humphrey, 24 Mich. 170 (1871).
National Bank v. Kimball, 103 U. S. 732.
State R. R. cases, 92 U. S. 575.

The offer in the bill is to pay "should it hereafter turn

out that said laws are constitutional and that any sum is payable by him" etc.

Rec. p. 108, par. 49.

Prima facie the sales to the State have extinguished the taxes.

Alleged Double Assessments.

Pleonasm is used in the 16th paragraph of the Bill, (Rec. p. 90) to allege that the state constitution is in conflict with the 14th amendment. The allegation contains no equity.

The provision of the constitution of the State referred to in the Bill is as follows:

"The legislature shall provide for an annual tax, sufficient with other resources, to pay the estimated expenses of the state government, the interest of the state debt, and such deficiency as may occur in the resources."

1 Comp. Laws of 1897, p. 114.
Constitution, Art. XIV, Sec. 1.

Under the constitution an annual tax is levied for the purposes therein specified. Many people delay in paying taxes, and when the next annual estimate occurs, there is a deficiency. The State requires the ready money, and so the annual estimate will include the deficiency. The bill assumes that the levy to meet the deficiency, thus becomes "duplicate, recurring and cumulative and in effect progressive," and therein lies the error. The provisions of tax laws look to the collection of all taxes, and for many years judicial procedure has been resorted to for the collection thereof. The tax law of 1893, Public Acts 1893, Act 206, may be referred to for the purpose of showing the times when taxes may be paid.

1. From Dec. 1 to Jan. 10, one per cent only as collection fee is added.
2. From Jan. 10 to March 1, 4 per cent is added.

Sec. 44-45.

3. After March 1, any person may pay taxes, but he must pay interest at the rate of eight per cent per annum, and office charges, and 4 per cent collection fee to County Treasurer.

(Sec. 59.)

Delinquent taxes are returnable May 1, to the Auditor General. Sec. 57. Remaining unpaid for about one year, from May 1, the Auditor General prepares his petition for sale under Sec. 61, and the decree is for taxes, interest and charges. One year is allowed for redemption from sale upon payment of taxes, interest and charges.

Sec. 74.

Thus it will be seen that taxes levied in any year, say 1893, would be returned to County Treasurer, and by him to Auditor General in 1894, and thus remain subject to payment until 1895, when petition for sale would be filed, and sale would be had and redemption would expire in 1896, or as the law now is, in 1897.

Public Acts of 1899, Act 262, Sec. 70.

Thus under the system for the collection of taxes, at least three years is occupied in the collection of the taxes levied in any one year, and when the lands become State tax lands, any person can then purchase the same in any year. He must pay as the purchase price:

1. Amount for which it was bid to State.
2. Interest at 1 per cent per month.

3. Other taxes remaining a lien and returned to Auditor General.

Public Acts of 1899. Act 262, Sec. 84.

It follows from the above that in the course of years, the delinquent taxes or deficiency of any year, will be largely paid to the State, and in each year that delinquent taxes are paid, so much less will be the amount to be raised by taxation.

Taxes may sometimes become delinquent because levied on exempt property, and in such case property assessable in the same taxing district, temporarily escapes its just burden.

The construction of the constitution and laws contended for in the bill is we submit erroneous. The court will take judicial notice of the laws of the State, and a demurrer does not admit as a fact the construction attempted in the bill of the constitution and law of the State of Michigan.

Finney v. Guy, 189 U. S. 335.

Statement of Property and Demand.

The Bill alleges failure to demand statement of complainant of his property and to demand payment of taxes, and failure to seize property to satisfy taxes.

Rec. p. 91, par. 18, 19, 20.

There is no equity in these allegations. Had the Supervisor demanded a statement from complainant and received it, the Supervisor would not have been bound by it. This is the tax law of Michigan, and the State Supreme Court sustains it.

Meade v. Haines, 81 Mich, 261-264.

Bowman v. Circuit Judge, 129 Mich. 608-610.
Public Acts of 1893, Act 206, Sec. 24.
Public Acts of 1899, Act 262, Sec. 24.

Complainant could have handed a statement to the Supervisor if he so desired to do. The jurisdiction of the Circuit Court in Chancery of the several counties was not defeated by failure to demand payment or to seize personal property to pay taxes.

Conley v. McMillan, 120 Mich. 694.

Complainant has had his day in court as to all such matters.

Berkey v. Burchard, 119 Mich. 101.
Muirhead v. Sands, 111 Mich. 487-495.

In Muirhead v. Sands, supra, Justice Montgomery, delivering the opinion of the Court said p. 495:

"The statute makes the publication the equivalent of personal service, and it is therefore the duty of the owner to watch the proceedings provided for by the statute for the foreclosure of the lien, and interpose any objection he may have to the validity of the tax. The purpose of the statute is to give every person his day in court, in an equitable proceeding."

Alleged Blending of the Legislative, Executive and Judicial Powers in the Tax Laws.

Rec. p. 93, par. 24, sub. 1.

It is alleged that the laws providing for a judicial determination of validity of assessments and taxation, are void,

for several reasons. Among others it is averred that the legislature assumes judicial duties, and pronounces decrees in tax cases, and that the court merely acts administratively. This objection is undoubtedly based on the pleadings and decree provided for in the tax laws. One citation will suffice for this purpose, as all the laws are similar.

Public Acts of 1889, Act 195, Sec. 53-57.

The form of the petition and decree is prescribed by the statute. But under section 56, provision is made for orders to be signed by the Judge setting aside illegal taxes.

Objection of this nature was made at an early day, and among the many objections it was alleged, "The act undertakes to make the proceedings in the Circuit Court in chancery, administrative instead of judicial." Justice Cahill, delivering the opinion of the Court, referring to the able opinion of Justice Cooley in a former case, held the law to be constitutional.

Auditor General v. Sloman, 84 Mich. 118.

As to the Auditor General, it is true that the tax law permits him to withhold a conveyance, or to issue certificate of error in certain cases specified in the statute, viz:

"First, That the land so sold was not subject to taxation at the date of the assessment of the taxes for which it was sold; or

Second, That the taxes had been paid to the proper officer within the time limited by law for the payment or redemption thereof; or

Third, That such sale was in contravention of any of the provisions of this act; or

Fourth, That a certificate that no taxes were charged

against said lands has been given by the proper officer, within the time limited by law for the payment or redemption thereof, the Auditor General shall withhold a conveyance of such lands, and shall, on demand, cause the money paid therefor to be refunded to the purchaser, with interest thereon at eight per cent per annum."

Public Acts of 1895, p. 298, Sec. 98.

The Supreme Court of the State have held however that his acts in this regard are ministerial.

Northrup v. Maneka, 126 Mich. 550.
Nowlen v. Hall, 128 Mich. 279.

Said section 98 was construed in 1903 in the case of Cole vs. Auditor General, 93 N. W. Rep. 890, overruling in part the case of Gurd v. Auditor General, 122 Mich. 151, and holding that the Auditor General could not issue a certificate of error upon a tax deed for lands if at the time of filing his petition the lands were held as state tax lands.

In the case of Cole v. Auditor General, supra, Justice Grant, delivered the opinion of the Court, saying in part, p. 893:

"The object of the statute, and of the chancery proceedings thereunder, would be largely nullified if the Auditor General had the power to inquire into all the proceedings anterior to the decree, and determine whether they were sufficient to give the court jurisdiction. We do not think the statute confers any such jurisdiction. If the legislature had intended to confer this extraordinary power upon the Auditor General, it would have been entirely unnecessary to specify the causes mentioned in subdivisions 1, 2, and 4. The genral power of subdivision 3, as claimed by respondent, or a

single general provision, would have covered the entire ground. To hold that the Auditor General is clothed with power to set aside the deeds for three reasons, numbered 1, 2, and 4, mentioned in section 98, and that subdivision 3 is limited to proceedings after decree, harmonizes the statute, and gives all its provisions a reasonable construction."

We submit that no question as to the 14th amendment can be raised in this matter.

Dreyer v. Illinois, 187 U. S. 71.

The case of Dreyer v. Illinois, supra, involved the indeterminate sentence law of the State of Illinois, and it was contended that the law violated the constitution of the State, which divided the powers of government into three distinct departments, legislative, executive and judicial, and other provisions of the constitution. The provisions of the constitution of Illinois cited in the opinion are so similar to the Michigan, that we quote the provisions of the Michigan constitution:

"Section 1. The powers of government are divided into three departments: The legislative, executive and judicial.

Section 2. No person belonging to one depa ment shall exercise the powers properly belonging to another, except in the cases expressly provided in this constitution."

Constitution of Michigan, Article III. Secs. 1 & 2.

"Section 1. The judicial power is vested in one supreme court, in circuit courts, in probate courts and in justices of the peace. Municipal courts of civil and criminal jurisdiction may be established by the legislature in cities.

Constitution of Michigan, Article VI, Section 1.

Mr. Justice Harlan delivering the opinion of the Court in Dryer v. Illinois, supra, said in part:

"Whether the legislative, executive, and judicial powers of a State shall be kept altogether distinct and separate, or whether persons or collections of persons belonging to one department may, in respect to some matters, exert powers which, strictly speaking, pertain to another department of government is for the determination of the State. And its determination one way or the other cannot be an element in the inquiry, whether the due process of law prescribed by the 14th amendment has been respected by the State or its representatives when dealing with matters involving life or liberty."

Order of Hearing.

Rec. p. 93, par. 24, sub. 2.

The bill assumes that the order of hearing provided by the tax law is a process, and avers the order lacks the constitutional words, "In the name of the People of the State of Michigan."

The form of the order is set forth in tax law of 1893.

1 Comp. Laws of 1897, Sec. 3885.
Public Acts of 1893, Act 206, Sec. 62.

The Supreme Court of the State, having under consideration different objections, held that an order which follows the prescribed form, is sufficient.

Waldron v. Auditor General, 109 Mich. 231.

Analogous cases have been decided by the Supreme Court of the State.

The drain law of 1885 required the Probate Court in proceedings to condemn a drain, to issue "a citation to all persons whose lands are traversed by such drain or who will be liable to assessment for benefits in the construction thereof, etc."

3 How. Ann Stats. Sec. 1740 c.

The citation was required to be addressed by name to resident owners, and provided further:

"If any lands involved are owned by non-residents of the township or townships, a copy of the citation, so far as it affects such lands, shall be published in some newspaper published and circulating in the county in which such lands are located, for at least two weeks previous to the day of hearing, which publication shall be deemed to be sufficient notice to all non-resident parties interested in such drain. The first publication of such notice shall be at least fourteen full days before the day of hearing, and proof of its publication shall be made as above provided in case of personal service."

3 How. Ann. Stats., Sec. 1740 cl.

The Supreme Court held that the object of the citation was to afford a hearing to the parties interested. It also held that the law did not require the citation to be issued under the seal of the Court, and that it was not such process as the constitution required to be in the name of the people.

Walpert v. Newcomb, 106 Mich. 357.

An early case in Michigan involved a warrant to a township treasurer, and it was contended that the tax rolls were

void because the warrant omitted the words of the constitution. The Court however sustained the position that the "common law definition of process is a writ issued by some court or officer exercising judicial powers."

Tweed v. Metcalf, 4 Mich. 588.

Suits may be commenced in Michigan by filing declaration and entering rule to plead. The declaration and rule however need not be "in the name of the People of the State of Michigan."

Penfold v. Slyfield, 110 Mich. 343.

To hold that an order of hearing omitting the words in question was void would revolutionize the practice in Michigan as to bringing in defendants by publication as allowed by other statutes.

1 Comp. Laws, Sec. 485-486.

Publication of Order of Hearing.

Rec. p. 93, par. 24, sub. 3-4-5.

The contention that Complainant was entitled to personal service of process, has been decided adversely to him, and the tax laws and decisions of the State Court show that the proceedings are in rem and against the land.

Auditor General v. Stiles, 83 Mich. 460.
Public Acts of 1882, Act 9, Sec. 57.
Public Acts of 1889, Act 195, Sec. 56.
Public Acts of 1891, Act 200, Sec. 56.
Public Acts of 1893, Act 206, Sec. 66.

We quote from Sec. 57 of the Act of 1882, which was followed in substance in this respect by the succeeding laws. "Such decree shall be considered as a several decree in favor of the State of Michigan against each parcel of land for each tax included therein."

Publication of an order of hearing has been held to be sufficient.

Cole v. Shelp, 98 Mich. 56.
Ball v. Ridge Copper Co., 118 Mich. 11.
Winona & St. P. Land Co. v. Minnesota, 159 U. S. 526.
Lent v. Tillotson, 140 U. S. 316.

Decree and Record.

Rec. p. 94, par. 24, Sub. 6-7-8.

We have shown that the judge signs tax decrees, and the tax laws are held valid by the Supreme Court in respect to the record of the decree.

Jenkinson v. Auditor General, 104 Mich. 34.
Merserau v. Miller, 112 Mich. 103.

Judicial Proceedings to Collect Taxes.

Rec. p. 94 par. 24, sub. 8.

It is averred that the proceedings inaugurated by the tax law of 1882 and followed by subsequent laws, excepting the tax law of 1885, are not due process of law. The tax law of 1882 was subjected to a thorough analysis in 1884.

State Tax cases, 54 Mich. 350, 417-456.

It will be seen by an examination of these cases that in the case of State of Michigan vs. Iron Cliffs Company, which came from the Circuit Court of Marquette County, in Chancery on appeal by the defendant, the law was sustained, at the June term of 1884 by an equal division of the Court. Justice Cooley writing for the law and Justice Champlin concurring. Justice Campbell writing against the law and Justice Sherwood concurring. In the other case coming from the Wayne Circuit the law had been held invalid by the lower court, and the Supreme Court at the April term of 1885 was evenly divided. The opinions of the Justices remained unchanged. The Tax law of 1889 was held constitutional by the Supreme Court.

Auditor General v. Sloman, 84 Mich. 118.

The tax law of 1893 has been attacked as unconstitutional in many respects, and has never been declared unconstitutional. It was claimed in one case to be unconstitutional because the tax record was allowed to go into the custody of the County Treasurer. The law was upheld by the Court.

Mersereau v. Miller, 112 Mich. 103.

In the case of Hooker v. Bond, 118 Mich. 256, the tax law of 1893 was attacked for several reasons, some of which were as follows:—

"1. The tax law of 1893 is unconstitutional, in that it permits landowners to be deprived of their property without due process of law.

2. The provision authorizing the issuance of the writ of assistance is void.

3. No demand for the payment of the taxes was made of the person liable to pay them.

4. The property was not assessed to the owner.

5. The collector did not seize and sell personal property to pay the tax.

6. No order pro confesso was ever entered.

7. No decree was made and entered of record in the proper book in the office of the register in chancery.

8. The decree does not contain a description of the property."

The law was sustained.

The Constitution of Michigan adopted in 1850 contained a provision similar to the 14th amendment, in that it provides that no person shall be "deprived of his life, liberty or property without due process of law."

1 Comp. Laws of 1897, p. 100, Sec. 32.

The tax law of 1893 was attacked because among other things, for want of due process of law, in that it did not provide for personal service on the tax payer of notice of hearing. The Law was sustained. The Court citing:

Winona Land Co. v. Minnesota, 159 U. S. 537.
Ball v. Ridge Copper Co., 118 Mich. 7.

We submit that the method of procedure has been settled to be in accord with the State constitution.

Exemptions.

Rec. p. 95, par. 25, sub. 4.

Exemptions allowed by the tax law are alleged to be a classification according to wealth. These exemptions are to be found in

Public Acts of 1893, p. 355-356-357.

The Supreme Court of the State has held that the legislature has the power of prescribing the subjects of taxation and of exemption.

The People v. Auditor General, 7 Mich. 84. (1859.)

The 14th Amendment does not prevent the exercise of this power of exemption.

Bells Gap v. Pennsylvania, 134 U. S. 232.
King v. Mullins, 171 U. S. 404.

Title of Tax Laws.

Rec. p. 95, par. 26.

It is averred that the tax laws, especially the law of 1893 and acts amendatory thereof, do not comply with the constitution of the State which requires that, "No law shall embrace more than one subject which shall be expressed in its title." That many of the laws are not purely amendatory but are repealing statutes, and are not so entitled, and that they prescribe periods of limitation for contesting tax titles and defining offenses, and providing penalties; objects which are not contained in the titles.

The Supreme Court of the State deciding a case, arising under the tax law of 1869, said that "Any provision, the object and tendency of which is to secure the collection of the public revenue, is germane to the general title above given."

Tillotson v. Circuit Judge, 97 Mich. 585-587.

The title of the tax law of 1889 has been sustained by the State Supreme Court.

Auditor General v. Stiles, 83 Mich. 460.

The tax law of 1885 contained 5 year limitation provisions. The title to the act was, "An Act to provide for the assessment of property and the levy and collection of taxes thereon."

Public Acts of 1885, p. 175, Act 153.

The case of St. Mary's Power Co. v. Chandler-Dunbar Water Power Co. 95 N. W. Rep. 554, was an action of ejectment, wherein the defense was five years' adverse possession under a tax deed issued in pursuance of that law. It was objected that the five year provision was void. Justice Hooker, delivering the opinion of the Court said p. 555:

"It is also urged that the provision is void for the reason that it is not germane to the title. In our opinion, this provision is an assurance well calculated to induce confidence in tax sales, and therefore within the rule."

The title to the tax law of 1893 was upheld in the case of Van Husan v. Heames, 96 Mich. 504. This law of 1893 prohibited deeds from record unless taxes were paid on the lands conveyed, and made a violation thereof a misdemeanor, and affixed a penalty not exceeding one hundred dollars.

Public Acts 1893, Act 206, p. 408, Sec. 135.

Justice Grant, delivering the opinion of the Court said p. 506:—

"Relator contends that this section is void, for the following reasons, viz.:

First. (a) The title to the act does not cover the section; (b) the act embraces more than one object.

Second. Its provisions cannot be complied with by the officers named.

Third. It is an unwarrantable infringement of property rights.

1. The evident purpose of the provisions of this section is to secure the collection of taxes, which is one of the general objects stated in the title to the act. We think, therefore, that the section cannot be held void, under section 20, art. 4, of the Constitution."

The Supreme Court of the United States follows the decisions of the highest State Court upon the question whether a statute is in accord with a state constitution.

Fallbrook Irrigation Dist. v. Bradley, 164 U. S. 112.
Gaines v. Stiles, 14 Pet. 322.

The title of the Act of 1897 amending the tax law, was held by the Supreme Court of the State not broad enough, and therefore void as to one section.

Savings Bank v. Aud. Gen'l, 123 Mich. 511.

Amendatory Act 154 of Public Acts of 1899 which created a Board of State Tax Commissioners has been held constitutional.

Board of State Tax Commissioners vs. Board of Assessors, 124 Mich. 491.
Board of State Tax Commissioners v. Quinn, 125 Mich. 128.

The amendatory acts to the tax law of 1893 relate to one subject, and that is the assessment of property, levy of taxes and collection thereof, and that there is a generality to the title, is no objection.

People v. Maheny, 13 Mich. 481.
Woodson v. Murdock, 22 Wall. 351.

Amount of Matter in Dispute.

County Treasurers.

One ground for the demurrer of County Treasurers is that it does not appear that the matter in dispute exceeds the amount of two thousand dollars, exclusive of interest and costs.

Rec. pp. 124-125-127-129-131.

It is averred that the matters and amount in dispute herein are the taxes assessed on the lands of complainant, and that the amount in each county is over two thousand dollars exclusive of all interest, costs and charges.

Rec. p. 85, par. 2.

The averment in the Bill is that "some lands of your Orator have been so homesteaded, that is placed upon the State homestead list."

Rec. p. 97, par. 28. Sub. 5.

There is no showing in the bill how many lands in each county remain off the homestead list. The averment in the bill as to some lands of complainant having been placed on the homestead list, allows the presumption that they have been deeded to the State "as to an individual" and are held by the Commissioner of the State Land office, and no County Treasurer has any duty, ministerial or otherwise, in regard to them. This can be seen by reference to the tax law of 1893, as amended.

Public Acts 1893, p. 406-7, Sec. 127 to 131.
Public Acts 1895, p. 301, Sec. 127.
Public Acts 1899, p. 150, Sec. 127.
Public Acts 1903, p. 110, Sec. 127.
Public Acts 1901, p. 188, Sec. 131.

The County Treasurer in one County has no concern with the taxes in another county, and taxes or tax titles in different counties cannot be joined to sustain jurisdiction.

Walter v. North Eastern R. Co. 145 U. S. 370.
City Bank v. Cannon, 164 U. S. 322.

We have already shown herein when discussing the question whether this was a suit against the State, that the Auditor General has no control over tax homestead lands.

State Land Office Commr. v. Aud. Genl., 91 N. W. Rep. 153.

In this case of Commissioner v. Aud. Gen'l, supra, said sections 127 and Sec. 127 as amended are quoted, and the law excludes County Treasurers and the Auditor General from any control over tax homestead lands.

It does not therefore appear in the Bill that there are tax lands in any one county, concerning which the County Treasurer can take any action, of the value of $2,000 exclusive of interest and costs, or upon which the taxes amount to $2,000, exclusive of interest and costs.

We submit there is no jurisdiction shown as to the County Treasurers, and again, if the Bill will not lie against the Auditor General, it will not lie against the County Treasurers.

Warner Valley Stock Co. v. Sec'y of Interior, 165 U. S. 28.

The Auditor General in his official capacity is the one against whom the principal relief is asked, and if any relief is asked against the County Treasurers, it is only incidental.

Successor in Office of Auditor General.

Perry F. Powers, who succeeded Roscoe D. Dix, as Auditor General assigned as one ground of demurrer that the amended bill would not lie against the successor in office of

Roscoe D. Dix, Auditor General of the State of Michigan. Rec. p. 122, Sub. 6. This position was sustained by the District Judge upon the authority of Warner Valley Stock Co. vs. Smith, 165 U. S. 28. Rec. p. 135.

Under the Act of Feb. 8, 1899, 1 Comp. Laws, p. 697, a suit against a head of department of the United States is not abated by reason of the expiration of his term of office, but this does not aid Complainant as to a State officer, and Complainant, should, we submit produce some statute of the State of Michigan similar to the U. S. Statute above cited, in order to justify a suit against the successor of Roscoe D. Dix.

Conclusion.

We submit for the foregoing reasons, and because of the long delay of the Complainant in presenting a complaint to the Court, that the decree of the Circuit Court be affirmed; but if the demurrers should be overruled, we desire leave to answer the Amended Bill.

Equity Rule 34.
United States v. Michigan, 190 U. S., p. 379.

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